



## **LIBRARY OF CONGRESS**

### **U.S. Copyright Office**

#### **37 CFR Parts 201 and 202**

**[Docket No. 2018-9]**

#### **Registration Modernization**

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

**ACTION:** Statement of Policy and Notification of Inquiry.

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**SUMMARY:** In conjunction with the development of new technological infrastructure for the copyright registration system, on October 17, 2018, the U.S. Copyright Office solicited public input regarding potential regulatory and practice updates to improve the system's efficiency for both users and the Office. The Office sought and received public comment on three main areas of proposed reform: the administration and substance of the application for registration, the utility of the public record, and the deposit requirements for registration. After reviewing the comments, the Office is announcing intended practice updates, to be adopted in conjunction with the deployment of the new technological system that the Library of Congress is building for the Office. The Office also seeks further comment on two proposals to permit post-registration edits to rights and permissions information, and to permit voluntary submission of additional deposit information to be included in the public record.

**DATES:** Written comments must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 30 DAYS AFTER 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 <https://www.copyright.gov/rulemaking/reg-modernization/>. 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:** Regan A. Smith, General Counsel and Associate Register of Copyrights, [regans@copyright.gov](mailto:regans@copyright.gov); Robert J. Kasunic, Associate Register of Copyrights and Director of Registration Policy and Practice, [rkas@copyright.gov](mailto:rkas@copyright.gov); Kevin Amer, Deputy General Counsel, [kamer@copyright.gov](mailto:kamer@copyright.gov); Erik Bertin, Deputy Director of Registration Policy and Practice, [ebertin@copyright.gov](mailto:ebertin@copyright.gov); or Jalyce E. Mangum, Attorney-Advisor, [jmang@copyright.gov](mailto:jmang@copyright.gov). They can be reached by telephone at 202-707-3000.

**SUPPLEMENTARY INFORMATION:** A highly functional registration system is of paramount importance to the Copyright Office as it administers title 17 for the benefit of the nation’s thriving copyright ecosystem.<sup>1</sup> Copyright registration provides valuable benefits to copyright owners, including providing access to federal court to initiate a lawsuit for infringement of a U.S. work,<sup>2</sup> serving as prima facie evidence of the validity of the copyright and the facts stated in the certificate of registration,<sup>3</sup> and enabling copyright owners to seek statutory damages and attorneys’ fees in litigation for works

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<sup>1</sup> See 17 U.S.C. 701(a) (“All administrative functions and duties under this title . . . are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress.”).

<sup>2</sup> 17 U.S.C. 411(a).

<sup>3</sup> 17 U.S.C. 410(c).

that are timely registered.<sup>4</sup> Registration also benefits users and prospective users of creative works by enabling them to find key facts relating to the authorship and ownership of such works in the Office’s online public record.<sup>5</sup>

Accordingly, modernizing the technological infrastructure of the copyright registration system is one of the Office’s top priorities. The Office is working with the Library of Congress’s Office of Chief Information Officer (“OCIO”), which is building an enterprise copyright system (“ECS”) to improve the Office’s provision of copyright services to the public, including its registration services. Copyright Office information technology (IT) modernization is being implemented in accordance with the overall model of IT centralization at the Library of Congress. Under this model, “the Copyright Office, with its expertise of both copyright law and its internal systems, provides required business features to the OCIO. The OCIO then uses its expertise to develop technology solutions to support those features for the Copyright Office.”<sup>6</sup>

To take advantage of forthcoming IT modernization development efforts and promote an efficient and innovative registration system, the Office published a notice of inquiry in October 2018 (“2018 NOI”) inviting public comment on several potential practice and policy changes to better meet the demands of users of the registration system in the digital age.<sup>7</sup> The 2018 NOI previewed technological features that the Office would like to be incorporated into the ECS, including a more dynamic application tracking dashboard, an integrated drag-and-drop submission option for electronic deposits, and an

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<sup>4</sup> 17 U.S.C. 412.

<sup>5</sup> Additional information is available at <https://www.copyright.gov/registration/>.

<sup>6</sup> *Library of Congress Modernization Oversight: Hearing Before the S. Comm. on Rules and Admin.*, 116th Cong. 24 (2019) (Statement of Carla Hayden, Librarian of Congress).

<sup>7</sup> Registration Modernization, 83 FR 52336 (Oct. 17, 2018).

improved messaging system to improve communication between the Office and applicants.<sup>8</sup> The Office also announced an intention to display a draft version of the registration certificate before final submission so that applicants can confirm that they have entered the correct information.<sup>9</sup> In addition to announcing these intended user features, the Office posed fifteen questions that fell into three categories of possible reform: (1) the administration and substance of the application for registration, (2) the utility of the public record, and (3) the deposit requirements for registration.<sup>10</sup>

Commenters expressed broad general support for the proposals set forth in the 2018 NOI. The Copyright Alliance was “pleased that the Office is considering a broad range of legal and policy changes regarding registration, and seeking input from stakeholders early in that process.”<sup>11</sup> Noting that “[a] modernized registration system is key for the healthy functioning of the copyright ecosystem in the 21st century,” the Association of American Publishers (“AAP”) expressed support for many of the Office’s “innovative proposals to make the registration process more efficient, intuitive, and competitive,”<sup>12</sup> and the American Intellectual Property Law Association (“AIPLA”)

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<sup>8</sup> *Id.* at 52337.

<sup>9</sup> *Id.* A similar display feature will be provided in the forthcoming electronic recordation system pilot.

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

<sup>11</sup> Copyright Alliance Comments, at 1–2 (Jan. 15, 2019); *see also, e.g.*, National Music Publishers’ Association (“NMPA”) Comments, at 3 (Jan. 15, 2019) (“NMPA appreciates the opportunity to comment on how the Office can design a registration system that will fit the needs of the modern music industry.”); Recording Industry Association of America, Inc. (“RIAA”) Comments, at 2 (Jan. 15, 2019) (“RIAA and its members applaud the Copyright Office . . . for thinking broadly about a variety of steps that could be taken to modernize the current copyright registration process.”). Unless otherwise noted, all comments cited refer to comments submitted in response to the 2018 Notice of Inquiry Regarding Registration Modernization.

<sup>12</sup> AAP Comments, at 8 (Jan. 15, 2019).

specifically praised the proposed updates that would allow “user-errors [to] be reduced through self-correction and proofing prior to filing.”<sup>13</sup>

Other commenters opined that the Office’s proposals did not address all of the shortcomings of the current registration system. For example, the Coalition of Visual Artists (“CVA”) cautioned the Office to avoid making incremental improvements when a comprehensive modernization effort is necessary to make the registration system easier and more cost effective for authors to use.<sup>14</sup> The Graphic Artists Guild (“GAG”) similarly contended that the modernization effort should not “proceed in a piecemeal fashion, without substantive changes to a system that for individual visual artists is broken.”<sup>15</sup> It expressed particular concern about registration processing times, highlighting that “[t]he processing time for the simplest online copyright registrations, requiring no communication, averages six months.”<sup>16</sup>

The Office takes these comments seriously and is pleased to note that, separate from the IT modernization process, it already has taken significant steps toward addressing a number of commenters’ concerns. For example, the Office has made extensive efforts to reduce registration processing times, particularly in light of the Supreme Court’s 2019 decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, which confirmed that Copyright Office action on an application for registration must be complete before the owner of a U.S. work can bring an infringement suit.<sup>17</sup> Since 2018, the average processing time for claims that are received through the electronic

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<sup>13</sup> AIPLA Comments, at 2 (Jan. 15, 2019).

<sup>14</sup> CVA Comments, at 2-3 (Jan. 15, 2019).

<sup>15</sup> GAG Comments, at 2 (Jan. 15, 2019).

<sup>16</sup> *Id.* at 1.

<sup>17</sup> 139 S. Ct. 881, 888, 892 (2019).

registration system and do not require correspondence (which make up seventy-two percent of claims) has been reduced from six months to three months.<sup>18</sup>

As a second example apart from IT modernization, the Office has also issued a notice of inquiry requesting written comments on issues relating to online publication, including whether and how to amend its registration regulations and other considerations relevant to ensuring continued thorough assistance to Congress.<sup>19</sup> This notice seeks to address recent feedback to the Office suggesting that the statutorily-drawn distinction between published and unpublished works is, as Copyright Alliance put it, “so complex and divergent from an intuitive and colloquial understanding of the terms that it serves as a barrier to registration, especially with respect to works that are disseminated online.”<sup>20</sup> The Office will analyze these issues related to online publication, as well as other potential practice changes, contemporaneously with, yet separately from, the OCIO’s efforts to upgrade the IT system through establishment of an ECS. While the Copyright Office remains dedicated to continuously exploring potential regulatory and/or practice changes through public discussion, the current Registration Modernization proceeding focuses on the practices directly relevant to the pending technological upgrades. The Library has committed to an IT development approach that can meet “the complex and unique mission of the Copyright Office today and for the future,” including “to accommodate possible future legal responsibilities” and to meet “evolving business

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<sup>18</sup> U.S. Copyright Office, *Registration Processing Times*, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>. The data is from April 1 through September 30, 2019.

<sup>19</sup> See Online Publication, 84 FR 66328 (Dec. 4, 2019).

<sup>20</sup> 84 FR at 66328 (citing Copyright Alliance Comments, at 5 (Jan. 15, 2019)).

needs.”<sup>21</sup> To the extent the publication proceeding, other pending or future rulemakings, result in regulatory or practice changes that need to be accommodated in the Office’s technology, the Office will communicate those requirements to the OCIO, but such changes will be considered separately from the umbrella of “modernization.”<sup>22</sup>

With respect to IT modernization, the Office is prioritizing public outreach to gain additional information about the needs and concerns of users of the registration system. The Office created a dedicated IT modernization webpage to keep stakeholders apprised of the status of modernization efforts.<sup>23</sup> In early 2019, the Office launched a bimonthly webinar series to report on the progress achieved on IT modernization initiatives and to discuss the overall direction of modernization.<sup>24</sup> And the Office continues to meet regularly with stakeholders and deliver presentations to external audiences to provide updates on modernization activities. OCIO user experience (UX) experts are also committed and involved to ensure that development can incorporate public input through robust user participation and feedback.<sup>25</sup>

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<sup>21</sup> Letter from Carla Hayden, Librarian of Congress, and Karyn A. Temple, Register of Copyrights & Dir., to Hon. Thom Tillis, United States Senate, 2–3 (Sept. 30, 2019), <https://www.copyright.gov/rulemaking/reg-modernization/letter-to-senator-thom-tillis.pdf>.

<sup>22</sup> As one exception; separately, the Office has issued two interim rules connected to the related IT modernization efforts with respect to its Recordation program. *See* Modernizing Copyright Recordation, 82 FR 52213 (Nov. 13, 2017); 85 FR 3854 (Jan. 23, 2020).

<sup>23</sup> U.S. Copyright Office, *Copyright Modernization*, <https://www.copyright.gov/copyright-modernization/>.

<sup>24</sup> U.S. Copyright Office, *Modernization Webinar*, <https://www.copyright.gov/copyright-modernization/webinar/>.

<sup>25</sup> Letter from Carla Hayden, Librarian of Congress, and Karyn A. Temple, Register of Copyrights & Dir., to Hon. Thom Tillis, United States Senate, 4–5 (Sept. 30, 2019), <https://www.copyright.gov/rulemaking/reg-modernization/letter-to-senator-thom-tillis.pdf>; Letter from Carla Hayden, Librarian of Congress, to Thom Tillis, Chairman, S. Comm. on the Judiciary, Subcomm. on Intellectual Prop., and Christopher A. Coons, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intellectual Prop., 8–9 (Jan. 7, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Hayden%20Responses%20to%20QFRs.pdf>.

To further advance these efforts, and following careful consideration of the comments received in response to the 2018 NOI, the Office is now announcing plans to adopt eleven registration practice updates that it will identify as business needs to the OCIO, so that they may be incorporated into the design of the new ECS to support a more user-friendly and efficient registration process that is simpler, clearer, secure, and adaptable. As detailed below, these updates relate to both the substance of the registration application and the utility of the online public record from a registration-specific perspective. The Office has concluded that each of these intended practice changes or design features can be incorporated into the ECS without adjusting existing regulatory language. As development efforts progress, the Office envisions initiating a pilot program that could permit incorporation of these updates through an iterative process that also takes into account participants' input, similar to the recently-announced pilot for the electronic recordation system.<sup>26</sup>

The Office also seeks further input from the public regarding two additional issues: (1) how the Office might implement a system that would allow users to make post-registration amendments to rights and permissions and unique identifier information; and (2) further considerations related to the possibility of permitting the voluntary submission of an additional public-facing deposit, that may display low-resolution or incomplete portions of the registered work to enhance the public record.

## **I Registration Practice Updates**

### **A) The Application Process: How Users Engage with the Registration System**

#### **1) New Application Assistance Tools**

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<sup>26</sup> See 85 FR at 3854.

Recognizing that users approach the system with varying levels of understanding of copyright law and technical experience, the NOI sought input on how the Office should integrate in-application support and assistance to users of the electronic registration system. The Office proposed multi-tiered support options to offer basic, intermediate, or in-depth support based on user experience level.<sup>27</sup>

All commenters expressed support for some form of improved assistance for users.<sup>28</sup> Some encouraged the Office to focus on improving the materials and resources currently available to applicants, with, for example, the AAP and the Motion Picture Association of America, Inc. (“MPAA”) urging the Office to expand upon its existing Frequently Asked Questions webpage.<sup>29</sup> The Association of Medical Illustrators (“AMI”) proposed that the Office provide a service similar to that of the U.S. Patent and Trademark Office (“USPTO”), which “maintains an inventor assistance hotline as well as a call center providing live, telephonic assistance in resolving problems of formalities of electronically submitted patent applications.”<sup>30</sup>

Other commenters recommended the development of new in-application assistance tools. For example, GAG suggested that the Office incorporate frequently asked questions and answers “throughout the registration application stream (possibly

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<sup>27</sup> 83 FR at 52338.

<sup>28</sup> See AIPLA Comments, at 2 (“AIPLA . . . supports including more embedded links to provide immediate help in completing each section of the online application.”); Copyright Alliance Comments, at 4 (“As an organization that represents a diverse group of copyright owners—including individual creators, and small and large businesses—the Copyright Alliance supports a multi-tier approach to in-application support and assistance that would more effectively meet the specific needs of both novice and experienced applicants.”); NMPA Comments, at 3 (“NMPA supports a multi-tiered approach to in-application assistance.”).

<sup>29</sup> AAP Comments, at 4; MPAA Comments, at 2–3 (Jan. 15, 2019).

<sup>30</sup> AMI Comments, at 3 (Jan. 15, 2019).

within an interactive widget that won't clutter or obstruct the interface).”<sup>31</sup> The New York Intellectual Property Law Association (“NYIPLA”) urged the Office to provide “more information and guidance in the online forms themselves,” and suggested that the USPTO’s “method of providing links to pop-up windows with additional information provides a good model for how information can be presented to users.”<sup>32</sup>

The Office will pursue both approaches. The Office is updating its website to provide additional guidance that applicants can consult before they begin or while they are completing an application. In addition to improving existing FAQs, the Office is updating its questionnaires and adding video tutorials. The Office also will request development of new tools for in-application assistance, such as the tiered system proposed in the 2018 NOI, subject to usability testing during the OCIO’s ECS development.

## **2) Electronic Applications**

The 2018 NOI sought comment on whether the Office should switch to a strictly-electronic system. After considering the feedback received, the Office will continue to encourage the use of electronic applications over paper forms by differentiating the fees for the standard and paper applications. But it will not, at this time, eliminate paper applications.

While paper applications remain the most cumbersome for the Office to ingest and examine,<sup>33</sup> these forms serve populations that do not have access to a computer or the

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<sup>31</sup> GAG Comments, at 3.

<sup>32</sup> NYIPLA Comments, at 2 (Jan. 15, 2019).

<sup>33</sup> See 83 FR at 52338 (noting that “a significant portion of claims submitted on paper forms require correspondence or other action from the Office, which further increases pendency times and contributes to the overall backlog of pending claims.”).

internet. The Office notes GAG’s comment that “there will always be a certain portion of the population who, for various reasons (such as disability, distance from libraries, time constraints, etc.) are unable to avail themselves of those resources.”<sup>34</sup> Additionally, several commenters expressed concerns about potential technology failures.<sup>35</sup> The 2018 NOI also sought input on whether to switch to electronic-only payment methods, eliminating the instances where payments may be made by cash or check. After consideration of these comments and review of the various regulatory provisions regarding payments,<sup>36</sup> the Office has determined to issue a separate notice to discuss proposed changes to streamline and harmonize its payment processing rules. The Office may separately consider questions related to the feasibility of subscription pricing under its current statutory authority.

### **3) Electronic Certificates**

Upon approving an application for registration of a copyright claim, the Office issues a certificate of registration.<sup>37</sup> While the Office has traditionally issued certificates in paper form, the 2018 NOI proposed providing electronic certificates in a secure form to ensure authenticity. The cost of the electronic certificate would be included in the

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<sup>34</sup> GAG Comments, at 4.

<sup>35</sup> AIPLA Comments, at 2 (“[T]echnology has limitations and suffers downtime and failures. It is often critically important that applicants file within strict time requirements to enforce their rights in court (17 U.S.C. § 411) or avoid losing statutory benefits (17 U.S.C. § 412).”); GAG Comments, at 4 (“Paper applications . . . fill in the gap when a system outage or government shutdown make the eCO system unavailable.”); NMPA Comments, at 6 (“[O]ur members who opt for the paper application largely do so because of negative experiences with the electronic system or interfering outages. Our members have found paper applications a useful backup option for when the electronic system is down.”).

<sup>36</sup> See, e.g., 37 CFR 201.6(a), 201.33(e)(2), 201.39(g)(3), 202.12(c)(2)(ii), 202.23(e)(2).

<sup>37</sup> 17 U.S.C. 410(a), 708(a)(1).

registration fee. The Office proposed that it would provide paper certificates upon request for an additional fee.<sup>38</sup>

All commenters supported the issuance of electronic certificates.<sup>39</sup> In response to the Office’s explanation that printing paper certificates “requires a substantial amount of resources both in terms of employee compensation and the cost of maintaining printing equipment,”<sup>40</sup> AMI agreed that “resources currently utilized for printing and mailing paper certificates should be redirected to other services, such as better application assistance.”<sup>41</sup> The Office accordingly will issue electronic certificates in the new ECS as a matter of course. The Office intends to offer paper certificates for an additional fee.<sup>42</sup> In addition, as noted below, the Office has determined that it is appropriate for these electronic certificates to be viewable in the public record.

Some commenters expressed concern about whether courts would accept electronic certificates.<sup>43</sup> The Office will request implementation of visual markers, such as watermarks, to indicate that an Office-issued electronic registration certificate is indeed authentic.

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<sup>38</sup> 83 FR at 52338–39; *see* 37 CFR 201.3(c)(14) (2019) (fee for obtaining an additional certificate).

<sup>39</sup> *See, e.g.*, Author Services, Inc. Comments, at 2 (Jan. 8, 2019) (“We support this proposal”); Copyright Alliance Comments, at 9 (“The Copyright Alliance supports the Office’s proposal to issue electronic certificates in lieu of paper copies and only offer paper certificates for an additional fee”); GAG Comments, at 4 (“We agree with the Copyright Office’s proposal that registration certificates be supplied as electronic documents with validating watermarks, etc.”); MPAA Comments, at 5 (“The MPAA has no objection to the Office issuing electronic certificates in the normal course, with paper certificates available for an additional fee.”); News Media Alliance (“NMA”) Comments, at 4 (Jan. 15, 2019) (“The Alliance supports the issuance of electronic certificates, particularly if it would expedite the application process and the resulting savings are used to offset costs to the registrants.”).

<sup>40</sup> 83 FR at 52338.

<sup>41</sup> AMI Comments, at 4.

<sup>42</sup> The Office will issue a notice regarding any additional fees. *See* 17 U.S.C. 708.

<sup>43</sup> Copyright Alliance Comments, at 9; MPAA Comments, at 5–6; NMPA Comments at 7; NYIPLA Comments, at 2; RIAA Comments, at 3.

## **B) Application Information: The Information Requested on the Application for Registration**

### **1) Simplifying the Authorship Statement**

The Copyright Act does not require registration applicants to describe the type of work for which registration is sought, except in the case of a compilation or derivative work.<sup>44</sup> But the Act permits the Register to require “any other information” that bears “upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.”<sup>45</sup> Thus, under current practices, “[t]o register a work of authorship, the applicant must file an application that clearly identifies the copyrightable authorship that the applicant intends to register.”<sup>46</sup> In the online application, the applicant can identify that authorship by “checking one or more of the boxes in the Author Created field that accurately describe the authorship.”<sup>47</sup> The options available vary depending on the type of application in use (*e.g.*, Literary, Visual Arts, or Performing Arts). If registering a literary work, the options are “text,” “computer program,” “photograph(s),” or “artwork.” If registering a visual arts work, the options include “photograph” and “two-dimensional artwork,” among others. If registering a performing arts work, the options include “music,” “lyrics,” “other text (includes script, screenplay, dramatic work),” and “musical arrangement.” As a result, works are described by their individual elements (*e.g.*, text, lyrics, or two-dimensional artwork), rather than by a holistic description of the work such as “children’s book with illustrations,” “research paper,” or

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<sup>44</sup> See 17 U.S.C. 409(1)–(10).

<sup>45</sup> *Id.* at 409(10).

<sup>46</sup> U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* sec. 618.1 (3d ed. 2017) (“*Compendium (Third)*”).

<sup>47</sup> *Id.* at sec. 618.4(A).

“craft book with photographs,” which may be more helpful for future identification purposes. Seeking to capture a more complete description of works submitted for registration, the Office proposed to adjust the Author Created section and ask applicants to identify the work as a whole instead of the work’s individual elements.<sup>48</sup>

Although the Office did not receive comments objecting to the adjustment of this requirement *per se*, several commenters opposed the wholesale elimination of the online application’s Author Created section.<sup>49</sup> For example, AAP argued that it is “helpful to the public record to have an applicant name the authorship, what is being registered, what is being disclaimed, and other such pertinent information.”<sup>50</sup>

The Office agrees that authorship descriptions provide pertinent information concerning registered works, and does not intend a complete removal of the Author Created section. Rather, the Office will request that the OCIO explore two complementary methods to obtain more complete and specific descriptions of works. First, the Office will request exploration of using tiers of descriptions that permit the applicant to gradually narrow the identification of their work using a more expanded decision tree format. Under this approach, the system would allow applicants to identify the work submitted for registration by using general and specific pre-populated descriptions, as well as a free-form space allowing applicants to provide more descriptive, non-legal information. General descriptions would include the categories of authorship set forth in section 102 of the Copyright Act, while specific descriptions could include particular types of works within those categories—for example, “novel,” “poem,” “article”

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<sup>48</sup> 83 FR at 52339–40.

<sup>49</sup> *See, e.g.*, AIPLA Comments, at 3–4; Authors Guild, Inc. (“Authors Guild”) Comments, at 3 (Jan. 15, 2019).

<sup>50</sup> AAP Comments, at 5.

or “podcast.” After testing the feasibility of this approach, the Office will provide guidance regarding whether this method is preferable to the current format.

Second, and potentially additive of the first approach, the Office will request that the OCIO investigate developing a table of crowdsourced descriptions, using as a model the USPTO’s Trademark Identification Manual, which provides users with acceptable identifications of goods and services for use in trademark applications.<sup>51</sup> This option would allow examiners to curate acceptable descriptions encountered through the examination process to add to the database, and for an applicant to rely upon this list for guidance in describing their work. This would allow the Office to consider and adopt industry-specific or specialized descriptors for applications on a going-forward basis.

For paper applications, the Office will permit the examiner to provide a description of the work submitted for registration where no description is provided by the applicant. Although commenters were not supportive of examiners providing work descriptions, arguing that it would “likely increase the workload of examiners and could have the effect of lengthening registration times and increasing costs,”<sup>52</sup> on average, paper applications comprise only 4% of all applications that the Office receives.<sup>53</sup> A common error that the Office encounters is a blank authorship section. Allowing examiners to provide this information would improve efficiency by reducing the correspondence required to obtain omitted authorship statements, which, as the Office has noted, “imposes significant burdens on the Office’s limited resources, and has had an

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<sup>51</sup> See USPTO, *Trademark ID Manual*, <https://idm-tmng.uspto.gov/id-master-list-public.html>.

<sup>52</sup> NMPA Comments, at 11.

<sup>53</sup> U.S. Copyright Office, *Registration Processing Times*, <https://www.copyright.gov/registration/docs/processing-times-faqs.pdf>.

adverse effect on the [pendency of] examination of claims submitted on electronic forms.”<sup>54</sup>

## 2) Derivative Works

For a compilation or derivative work, the Copyright Act requires copyright registration applicants to identify “any preexisting work or works that it is based on or incorporates” and to provide “a brief, general statement of the additional material covered by the copyright claim being registered.”<sup>55</sup> Generally, the Office attempts to obtain this information in two steps. First, the applicant must “identify the new authorship that the applicant intends to register” by checking one or more boxes that appear under the heading “Author Created” in the online application that describe the new material the applicant intends to register, or by providing a descriptive statement in the “Nature of Authorship” space on the paper application.<sup>56</sup> Second, if the derivative work contains an appreciable amount of preexisting material that was previously published, previously registered, in the public domain, or owned by a third party, the applicant must identify that material by checking one or more boxes in the “Material Excluded” field of the online application or by providing a brief statement in the corresponding section of the paper application.<sup>57</sup> This method can lead to gaps in the public record because it “encourage[s] applicants to identify individual elements of the work that should be excluded from the claim,” but it does not require applicants to identify the preexisting work itself.<sup>58</sup> Further, in the Office’s experience, the checkboxes provided on the

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<sup>54</sup> 83 FR at 52338.

<sup>55</sup> 17 U.S.C. 409(9).

<sup>56</sup> *Compendium (Third)* sec. 618.5.

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

<sup>58</sup> 83 FR at 52341.

application may limit applicants' ability to fully describe the nature of their claims, leading to errors in identifying new or preexisting material. For example, using the checkboxes, applicants often mark the "Material Included" as "text" and the "Material Excluded" also as "text." These descriptions do not add any meaningful information to users of the public record.

To avoid this result, the 2018 NOI proposed requiring applicants to identify explicitly whether a work submitted for registration is a derivative work. If the work is identified as derivative, applicants would be directed to identify, in their own words, any elements that should be excluded from the claim. And, assuming that the applicant intends to register all copyrightable aspects of the work that have not been expressly disclaimed, the applicant would not be required to identify the new material that should be "included" in the claim.<sup>59</sup>

While most commenters acknowledged that it would benefit the public record to require applicants to explicitly identify derivative works submitted for registration,<sup>60</sup> some were concerned that such a requirement would cause confusion. For example, the Copyright Alliance had "concerns that novice applicants might be confused about how to answer such a question," believing that it "would require an understanding of the nuance between 'transformation' as it is used in fair use, and 'transform' as it is used to define a

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<sup>59</sup> *Id.*

<sup>60</sup> *See, e.g.*, AIPLA Comments, at 4 ("AIPLA believes that applicants should be required to identify whether the work submitted for registration is a derivative work"); AMI Comments, at 6 ("The AMI would not object to asking applicants to affirmatively state whether a work submitted is derivative *provid[ed] the application form makes it crystal clear as to what constitutes a derivative work.*"); NYIPLA Comments, at 3 ("It is often helpful to know whether a registered work is a derivative work").

derivative work.”<sup>61</sup> GAG likewise noted that “novice users (and even experience[d] users) are often tripped up in interpreting whether a work is derivative.”<sup>62</sup> Instead of asking whether a work is a derivative work, commenters argued that the Office should ask “whether preexisting works have been used, and if yes, what those works are.”<sup>63</sup> Some commenters also expressed concern that eliminating the requirement to identify the new material that should be included in the claim would “wreak havoc with the Copyright Office’s objective to produce as accurate a public record as possible.”<sup>64</sup>

Others supported this proposed approach. AMI opined that eliminating “cumbersome checkboxes” and allowing applicants “to more easily explain in their own words the elements that are pre-existing versus the ‘new material to be included’” would simplify the registration process for such works.<sup>65</sup> AIPLA agreed that “asking the applicant to identify the new authorship is unnecessary . . . and that the Office should assume that the applicant intends to register all copyrightable aspects of the work.”<sup>66</sup>

After reviewing the comments, the Office continues to believe that the current identification process should be simplified, but agrees that use of the term “derivative work” may cause confusion. Instead, the Office will provide a business requirement that

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<sup>61</sup> Copyright Alliance Comments, at 17.

<sup>62</sup> GAG Comments, at 7.

<sup>63</sup> *Id.*; see American Bar Association Section of Intellectual Property Law (“ABA-IPL”) Comments, at 5 (Jan. 9, 2019) (“The Section suggests that a simpler process for soliciting factual information about preexisting materials would be to include questions requiring ‘yes/no’ responses”).

<sup>64</sup> AAP Comments, at 6.

<sup>65</sup> AMI Comments, at 5 (citation omitted).

<sup>66</sup> AIPLA Comments, at 4; see also New Media Rights (“NMR”) Comments, at 17 (Jan. 15, 2019) (“If the user disclaims content, presumably the rest of the protectable audiovisual work is original content created by the author, so the ‘New Material Included’ category does not seem necessary or relevant *unless* the work being registered is a new edition of a previously registered work (which is a very specific subset of content).”); AAP Comments, at 5 (“AAP members are in favor of asking applicants to explicitly identify whether a work submitted for registration is a derivative work and to identify, in their own words, any elements that should be excluded from the claim.”).

the revised electronic application ask applicants, in plain language, about the facts relating to the authorship of the work (*e.g.*, Is the work based on one or more preexisting works? Does the work incorporate any preexisting work?). The Office will request that the system allow applicants to identify any elements that should be excluded from the claim using their own words, rather than a set of predetermined checkboxes. This approach is intended to streamline the process by which applicants can disclaim preexisting material.

### 3) Simplifying the Transfer Statement

An application for registration must identify the copyright claimant.<sup>67</sup> The “claimant” is either the author(s) of the work submitted for registration,<sup>68</sup> or an individual or organization that owns all of the rights under copyright.<sup>69</sup> To register a claim of copyright, “if the copyright claimant is not the author,” the copyright registration application must include “a brief statement of how the claimant obtained ownership of the copyright.”<sup>70</sup> This “brief statement” is termed a transfer statement. Further, the Copyright Act specifies that copyright may be transferred (1) “by any means of conveyance,” (2) “by will or . . . by the applicable laws of intestate succession,” or (3)

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<sup>67</sup> 17 U.S.C. 409(1).

<sup>68</sup> *Id.* at 201(a) (“Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.”).

<sup>69</sup> *Id.* at 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”); 37 CFR 202.3(a)(3) (defining claimant as the author of a work or the person or organization that has obtained all rights under copyright initially belonging to the author).

<sup>70</sup> 17 U.S.C. 409(5).

“by operation of law,” and so the transfer statement must fit within these statutory guidelines.<sup>71</sup>

As the 2018 NOI explained, the current online registration application allows applicants to provide a transfer statement by selecting one of three options in a drop-down menu marked “Transfer Statement.” The three options are “By written agreement,” “By inheritance,” and “Other.” The *Compendium of U.S. Copyright Office Practices* provides that “[i]f the claimant obtained the copyright through an assignment, contract, or other written agreement, the applicant should select ‘By written agreement.’”<sup>72</sup> And “[i]f the claimant obtained the copyright through a will, bequest, or other form of inheritance, the applicant should select ‘By inheritance.’”<sup>73</sup> The applicant may select “Other” and provide a more specific transfer statement in a blank space marked “Transfer Statement Other” if “By written agreement” or “By inheritance” do not fully describe the transfer.

In the 2018 NOI, the Office proposed eliminating the “Other” option both to avoid confusion among applicants and to better align the process with the statutory text. Applicants often provide conflicting information when they select the “Other” option, which requires examiners to expend time to correspond with applicants to correct the application and delays the resolution of claims. Because the methods of transfer are limited by section 201, practically speaking, the only correct statement that can be provided in the “Other” space is a transfer occurring “by operation of law,” a legal concept referring to rights that arise under specific contingencies such as by court-ordered or bankruptcy-related transfers, certain forms of acquisitions such as stock sales,

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<sup>71</sup> *Id.* at 201(d)(1).

<sup>72</sup> *Compendium (Third)* sec. 620.9(A).

<sup>73</sup> *Id.*

or explicit agreements providing for joint ownership with rights of survivorship.<sup>74</sup> The Office accordingly proposed to replace the “Other” option with “By operation of law.”<sup>75</sup>

Most commenters supported the Office’s proposal, agreeing that it would “simplify and clarify the process for completing transfer statements.”<sup>76</sup> Others, however, expressed concern about the proposed change. For example, the Authors Guild argued that the “means of acquiring ownership other than by written transfer or inheritance should be spelled out in a dropdown menu in plain English and explained” because “‘By operation of law’ is a broad and legal term that non-lawyers won’t necessarily understand.”<sup>77</sup> AAP opposed removing the “Transfer Statement Other” field, recommending “a flexible and open format to accommodate sufficient explanation in cases of complicated transfer statements” to support a “robust and useful public record.”<sup>78</sup>

As several commenters pointed out, copyright transfer remains a confusing area of law for many applicants.<sup>79</sup> While it might at first seem that giving applicants more space to describe their particular transfer scenario would enhance the public record, the Office’s experience indicates that an open format text box can give rise to inconsistent

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<sup>74</sup> See David Nimmer & Melville Nimmer, 3 Nimmer on Copyright sec. 10.03(A)(6) (2019).

<sup>75</sup> 83 FR at 52341.

<sup>76</sup> NYIPLA Comments, at 3; *see also* AMI Comments, at 6 (“The AMI supports simplification of transfer statements.”); International Trademark Association (“INTA”) Comments, at 7 (Jan. 10, 2019) (“[S]ince Copyright Act Section 201(d)(1) provides for transfer of an author’s interest only by written agreement, inheritance, or operation of law, limiting the transfer statement to these three categories is advisable.”); MPAA Comments, at 9 (“The only options that should be available to registrants in describing a transfer of ownership are those mentioned in 17 U.S.C. §201: ‘by written agreement,’ ‘by inheritance,’ or ‘by operation of law.’ There is no statutory justification for the ‘Other’ option, which should be eliminated.”).

<sup>77</sup> Authors Guild Comments, at 4.

<sup>78</sup> AAP Comments, at 6.

<sup>79</sup> See Authors Guild Comments, at 4; Copyright Alliance Comments, at 17; GAG Comments, at 7; INTA Comments, at 7.

information, while increasing registration processing time due to the need for correspondence. Therefore, the Office tentatively concludes it would be optimal to eliminate the “Other” field and restrict the available fields to “By written agreement,” “By inheritance,” and “By operation of law” to improve efficiency. Rather than requiring applicants to describe the transfer in their own words, the Office intends to provide guidance, such as information icons or other in-application assistance, to provide a clear definition of each transfer statement option for applicants, including, in particular, to explain what instances may constitute a transfer “by operation of law.”

The Office is also exploring the value of providing a space for applicants to add any recordation document numbers that support the transfer statement. While a copy of an agreement, conveyance, or other legal instrument is not an acceptable substitute for a transfer statement,<sup>80</sup> if such an instrument has been recorded with the Office, the relevant recordation information may be valuable to the registration record. Should this option prove feasible, the Office will provide in-application guidance on relevant document recordation topics.

#### **4) In-Process Corrections**

The current online registration system does not permit applicants to make manual corrections once an application is submitted to the Office. The applicant must contact the Public Information Office to ask the Office to make any necessary corrections. For the new ECS, the Office proposed removing this limitation and permitting applicants

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<sup>80</sup> *Compendium (Third)* sec. 620.10(A).

to make changes to pending applications at any point before an examiner opens the application for review.<sup>81</sup>

All commenters supported this proposal,<sup>82</sup> but several requested that the ECS warn applicants when an amendment would change a work's Effective Date of Registration.<sup>83</sup> ImageRights International, Inc. ("ImageRights") recommended that the system "present a schedule of what types of changes can be made without altering the Effective Date of Registration and which changes would change the Effective Date."<sup>84</sup>

In general, to establish an Effective Date of Registration, the Office must receive an acceptable application, a complete deposit copy, and the appropriate filing fee.<sup>85</sup> The Effective Date of Registration is the date the Office receives all three of these elements, but "[w]here the three necessary elements are received at different times the date of receipt of the last of them is controlling."<sup>86</sup> The *Compendium* sets forth the minimum requirements for an acceptable application, deposit copy, and filing fee.<sup>87</sup> In consideration of the comments, the Office envisions that the new ECS will incorporate

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<sup>81</sup> 83 FR at 52341.

<sup>82</sup> See, e.g., AIPLA Comments, at 5 ("AIPLA supports permitting applicants to make edits to pending applications in most circumstances."); AAP Comments, at 6 ("AAP members generally support the proposal of allowing applicants to make in-process edits to open cases prior to the examination of application materials.").

<sup>83</sup> AAP Comments, at 6 ("We trust the Office would establish clear parameters and practices as to when such corrections would trigger a change in the effective date of registration."); Copyright Alliance Comments, at 18 ("The Office should permit applicants to make in-process edits to open cases at any point *prior* to the examination of the application materials, provided that the Office clearly warns applicants prior to making changes that a modification could alter the effective date depending on the type of change and explains the types of changes that would result in change in the effective date.").

<sup>84</sup> ImageRights Comments, at 6 (Jan. 15, 2019).

<sup>85</sup> *Compendium (Third)* sec. 625.

<sup>86</sup> H.R. Rep. No. 94-1476, at 157 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5773.

<sup>87</sup> *Compendium (Third)* sec. 625.

these current rules to warn applicants when an amendment would alter the Effective Date of Registration.

### **5) Application Programming Interfaces (“APIs”)**

A copyright system of the twenty-first century demands flexibility, agility, and adaptability to technological advancements. The Office believes that the use of APIs—interfaces that permit communication between two systems or software programs—could improve the registration system by enabling programs used in the process of creating works to submit copyright registration applications or extract data from the online public record. To explore possible uses of this technology in the new ECS, the Office invited comment on how it could use APIs to integrate external data into the registration system or allow parties to export internal data from the Office’s registry. The Office also inquired about relevant design considerations, such as establishing a trusted provider framework to minimize spam submissions and deter predatory behavior.<sup>88</sup> Commenters generally agreed that using APIs would benefit registration applicants and users of the online public record,<sup>89</sup> although some commenters urged the Office to provide adequate safeguards to protect the security of the data and to guard against abuses by bad actors.<sup>90</sup>

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<sup>88</sup> 83 FR at 52342–43.

<sup>89</sup> Artists Rights Society Comments, at 4 (Jan. 10, 2019) (“ARS . . . would welcome the opportunity to develop in cooperation with the Office an API that would be tailored to the needs of ARS members so that when members sign up with ARS . . . they also might be able to complete an electronic registration form.”); CVA Comments, at 27–28 (encouraging the Office “to develop robust Application Programming Interfaces (APIs) that will allow third-party image management software to interface directly with the Copyright Office’s registration system”); Copyright Alliance Comments, at 21 (expressing support for “allowing third-parties to interoperate with the Office’s API in a way that would integrate registration into a creator’s workflow to streamline and simplify the registration process”); GAG Comments, at 8 (expressing support for the “integration of APIs into the registration system so that registration becomes part of a creator’s workflow”).

<sup>90</sup> *See, e.g.*, Copyright Alliance Comments, at 23 (urging the Office to “create terms of service for access to its API,” which would allow the Office “to block access . . . [by] third parties who abuse

With stakeholder support, the Office will continue to explore and clarify its business needs related to the use of APIs for two purposes: (1) ingesting data into the Office online registration system, and (2) extracting information from the online public record. Of course, any new functionality must provide appropriate security for all relevant data. The Office will continue to communicate this need to the OCIO.

Initially, the Office will prioritize investigation of ways to allow for the transmission of data between the registration system and the database of musical works information that will be administered by the Mechanical Licensing Collective (“MLC”) pursuant to the Orrin G. Hatch–Bob Goodlatte Music Modernization Act.<sup>91</sup> The MLC database will contain information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works and the sound recordings in which the musical works are embodied.<sup>92</sup> To reduce the incidence of unmatched works, where the copyright owner has not been identified or located, the MLC will operate a claiming process by which musical work copyright owners may identify their ownership interests in a musical work underlying a specific sound recording, to receive accrued royalties for the usage of that musical work.<sup>93</sup>

By law, the Copyright Office may access the database in a bulk, machine-readable format, although the Office may not treat the database or any of its information therein as a Government record.<sup>94</sup> As some have suggested,<sup>95</sup> providing a method of access between

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the APIs” though spam submissions or predatory behavior); PPA Comments, at 16 (stating that the Office must ensure that “the process is secure and able to handle the influx of data”).

<sup>91</sup> Pub. L. 115–264, 132 Stat. 3676 (2018).

<sup>92</sup> 17 U.S.C. 115(d)(3)(C).

<sup>93</sup> *Id.* at 115(d)(3)(I), (J)(iii); *see id.* at 115(e)(35).

<sup>94</sup> *Id.* at 115(d)(3)(E)(v).

the copyright and MLC registration systems could permit a copyright owner to verify or update ownership information with respect to musical works listed in the MLC database alongside the process of completing a copyright registration application for that work, or vice versa. The Office has concluded that the MLC database represents an appropriate starting point for API development. While the Office will prioritize this aspect, the Office will also work with the OCIO to explore additional avenues to facilitate the ingestion and exportation of data through APIs, while ensuring the integrity of registration records and safeguarding against abuses.

### **C) Public Record: How Users Engage and Manage Copyright Office Records**

#### **1) The Online Registration Record**

The Copyright Act charges the Copyright Office with ensuring “that records of deposits, registrations, recordations, and other actions taken under this title are maintained” and are “open to public inspection.”<sup>96</sup> The 2018 NOI proposed to expand the online public record to include records of pending applications, refusals, closures, appeals, and correspondence for completed claims.

This proposal received significant support from many commenters. For example, the American Association of Law Libraries (“AALL”) supported “publishing refused registration application records, full versions of correspondence records, and associated appeal records in the online public record because we believe it would help the public better understand the originality requirement in copyright law and assist those who wish

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<sup>95</sup> David C. Lowery, *Simplifying Registration and Costs for MLC*, The Trichordist (Nov. 6, 2019), <https://thetrichordist.com/2019/11/06/simplify-registration-and-costs-for-mlc/> (“It seems like a simple solution for the Copyright Office to harmonize [the online registration system and the MLC database] to . . . have a check box to allow you to sign up with the MLC.”).

<sup>96</sup> 17 U.S.C. 705.

to register a claim to a copyright understand the contours of what ‘constitute[s] copyrightable subject matter.’<sup>97</sup> Similarly, AIPLA noted that “the need for full information regarding an application and registration is often crucial for litigation, licensing, and corporate diligence, among other circumstances.”<sup>98</sup>

Some commenters, however, expressed concern that records of correspondence may expose personally identifiable information or informal communications that applicants may not wish to make public. Explaining that “[c]orrespondence between applicants and the Office is often informal,” AAP argued that including such materials “would not be appropriate [or] useful for the Public Record and could be misused by persons who have no claim to the work in question.”<sup>99</sup> Other commenters argued that the public record should be limited to records of what has been registered by the Copyright Office.<sup>100</sup> NMPA, for example, contended that “[o]nly a subset of copyrights would benefit from the inclusion of . . . additional information in the Online Public Record” and that “[i]ncluding large amounts of administrative information concerning a registration would likely slow the system down and be an inefficient use of the Office’s resources.”<sup>101</sup>

Current law and regulations require the Office to make available for public inspection any “[o]fficial correspondence, including preliminary applications, between copyright claimants or their agents and the Copyright Office, and directly relating to a completed registration, a recorded document, a rejected application for registration, or a

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<sup>97</sup> AALL Comments, at 1 (Jan. 14, 2019) (citing 17 U.S.C. 410(b)).

<sup>98</sup> AIPLA Comments, at 6.

<sup>99</sup> AAP Comments, at 7.

<sup>100</sup> *See, e.g.*, RIAA Comments, at 8 (“The online public record should support its primary purpose to notify the public of which works have been registered, and not be appended in a manner that detracts or dilutes from this important function.”).

<sup>101</sup> NMPA Comments, at 17–18.

document for which recordation was refused.”<sup>102</sup> Further, the current registration application displays a privacy notice stating that the information collected for registration “will appear in the Office’s online catalog.”<sup>103</sup> Given that registration records are already available for public inspection and copying,<sup>104</sup> the Office does not see a persuasive basis for categorically excluding them from online availability, although the Office will approach historical materials sensitively to address any potential notice or privacy considerations. Expanding the online public record to include these materials would advance the Office’s goal to “[e]xpand access to Copyright Office records” and “[e]nhance services” to make it “easier and more convenient for users to transact business with the Copyright Office.”<sup>105</sup> As such, on a prospective basis, the Office will request that the ECS include records of pending applications, refusals, closures, appeals, and correspondence for completed claims in the new online public record. The Office’s PII removal rule will remain in place to provide for removal of extraneous PII from the public record upon request.<sup>106</sup>

Similarly, the Office will work with the OCIO to make digital copies of registration certificates available in the online public record.

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<sup>102</sup> 37 CFR 201.2(c)(1); *see also* 17 U.S.C. 705.

<sup>103</sup> U.S. Copyright Office, *eCO Registration System Standard Application*, <https://eco.copyright.gov/> (“Privacy Act Notice: Sections 408-410 of title 17 of the United States Code authorize the Copyright Office to collect the personally identifying information requested on this form in order to process the application for copyright registration. By providing this information you are agreeing to routine uses of the information that include publication to give legal notice of your copyright claim as required by 17 U.S.C. § 705. It will appear in the Office’s online catalog. If you do not provide the information requested, registration may be refused or delayed, and you may not be entitled to certain relief, remedies, and benefits under the copyright law.”).

<sup>104</sup> *Compendium (Third)* sec. 2407.1(B)(1).

<sup>105</sup> U.S. Copyright Office, *Strategic Plan 2019–2023, Copyright: The Engine of Free Expression* 13 (2019), <https://www.copyright.gov/reports/strategic-plan/USCO-strategic2019-2023.pdf>.

<sup>106</sup> *See* 37 CFR 201.2(f).

## 2) Linking Registration and Recordation Records

Arising out of historical practice, registration and recordation records are currently maintained as discrete data sets. Because these records are not linked, it can be difficult to identify chain-of-title information for particular works contained in the Office's records. All commenters supported the Office's proposal to link registration and recordation records, so that information about registered claims, recorded transfers, and/or other chain of title information can be viewed together to facilitate access to information about copyrighted works, including updated ownership information.<sup>107</sup>

Because the registration and recordation processes are voluntary, however, commenters also highlighted some areas of caution, which the Office itself is taking into account when developing requirements for the new ECS. For example, RIAA noted that while linking records would be useful, it could "create confusion where the records are incomplete or the chain of title is unclear."<sup>108</sup> RIAA also expressed concern about "what legal presumptions may be made based on the chain of title in a recordation record where there is no obligation for a subsequent rights holder to file a transfer or security interest

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<sup>107</sup> AALL Comments, at 3 (noting that the proposal "would assist users who are attempting to obtain permission to use a work with accurately identifying and contacting the current copyright owner"); ABA-IPL Comments, at 7 ("The Section strongly supports connecting registration and recordation records."); Authors Alliance Comments, at 5 (Jan. 15, 2019) (noting that the proposal would "increase[] the likelihood that users will be able to locate current and accurate contact information for copyright holders, better facilitating licensing and permissions requests"); INTA Comments, at 15 (expressing support for "provid[ing] chain of title information"); NMPA Comments, at 18 ("The registration and recordation systems should be fully integrated and should be part of the same database."); Nanette Petruzzelli Comments, at 5 (Jan. 14, 2019) (supporting the proposal so that "public inquiry about the current copyright status of a work can be found in one record/file").

<sup>108</sup> RIAA Comments, at 8.

with the Office.”<sup>109</sup> The MPAA cautioned that the Office should not “itself engage in chain-of-title analysis.”<sup>110</sup>

The Copyright Office appreciates the need for the ECS to clearly communicate the limitations of the public record to users of the system. Currently, the Office warns that while “[s]earches of the Copyright Office catalogs and records are useful in helping to determine the copyright status of a work . . . they cannot be regarded as conclusive in all cases.”<sup>111</sup> The Office will continue to explore ways to minimize confusion on the part of users. For example, the Office may request that the ECS begin by linking only future registration and recordation records.

Second, commenters discussed how the Office should display assignment information and documentation within public registration records. The ABA-IPL suggested that the USPTO’s system, which consists of an “Assignment Abstract of Title” linked to the database entry for a mark identified in a search, could be a model for the Copyright Office’s system.<sup>112</sup> The NYIPLA similarly suggested that “the Trademark Office offers a good model in that the application/registration data is directly linked to the chain of title information.”<sup>113</sup> The Office found these comments helpful and hopes to work with the OCIO to explore the specific manner of display for the new online public record system.

### **3) Unified Case Number**

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<sup>109</sup> RIAA Comments, at 8.

<sup>110</sup> MPAA Comments, at 13.

<sup>111</sup> U.S. Copyright Office, *Circular 22: How to Investigate the Copyright Status of a Work* 3 (Feb. 2013), <https://www.copyright.gov/circs/circ22.pdf>; *see also* U.S. Copyright Office, *Request a Search Estimate*, [https://www.copyright.gov/forms/search\\_estimate.html](https://www.copyright.gov/forms/search_estimate.html).

<sup>112</sup> ABA-IPL Comments, at 7.

<sup>113</sup> NYIPLA Comments, at 5.

The Office currently administers and tracks separate numbers for applications, correspondence, and registrations, which creates challenges for the Office and users. To streamline identification methods, the 2018 NOI proposed to unify the Office’s identification numbers to create a clear relationship between an application for registration, any correspondence, and any associated request for reconsideration.<sup>114</sup> There was a general consensus among commenters in support of the Office’s proposal.<sup>115</sup>

Accordingly, for future applications, the Office would like the system to adopt one number for any pending application and registration record completed from that application. The Office envisions that the number assigned to an application (the “case number”) and the registration number will have an identical base, but the registration number will be distinguished by a prefix that indicates the administrative class or type of registration. For example, case number 12345678 for a performing arts work would become PA12345678, if registered. To further simplify the registration process, the Office will also retire correspondence identification numbers.

#### **D) Digital Deposits**

In the 2018 NOI, the Office requested comment on whether applicants should be permitted to submit electronic deposit copies, phonorecords, or identifying materials, rather than physical copies or phonorecords, unless the Office requests a physical copy.<sup>116</sup> While commenters expressed general support for providing greater flexibility in

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<sup>114</sup> 83 FR at 52344.

<sup>115</sup> *See generally* AIPLA Comments, at 7 (“AIPLA strongly supports this proposal.”); AAP Comments, at 8 (“AAP members are in favor of unified case numbers to track and identify a work or group of works through the registration and appeals process”); PPA Comments, at 16 (“PPA supports a single case number which remains with the application through the registration process and after the registration is issued. This will help with tracking and consistency.”).

<sup>116</sup> 83 FR at 52344–45.

complying with deposit requirements, the comments raised a number of concerns. The Library of Congress's Library Services unit expressed concern over the potential effect of such a change on Library collections. Noting that "[t]he Library depends on the continuing flow of items acquired via Copyright deposit to help build its collection," it noted that "implementation of this strategy would require that a duplicative process be established to obtain deposit copies for the Library's collection."<sup>117</sup> Subsequently, in response to a question raised by the Senate Judiciary's IP Subcommittee, the Librarian of Congress noted that "a change to a default digital deposit requirement would critically affect our ability to serve some of our largest user groups, either by not meeting their preferences or by denying service altogether."<sup>118</sup>

Other commenters representing copyright owner interests raised potential security concerns. For example, the Copyright Alliance pointed to the possibility of cyberattacks resulting in unauthorized access to deposit copies.<sup>119</sup> AAP stated that "[p]ublishers would welcome a registration deposit regime that is less burdensome, but only if it is operated in a wholly secure IT system and kept wholly separate from the collections of the Library and its access or interlibrary lending or surplus books policies."<sup>120</sup> In its view, such changes are "premature and will remain so until the Copyright Office is permitted and able to develop the necessary IT systems and security."<sup>121</sup>

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<sup>117</sup> Library of Congress Library Services Comments, at 1–2 (Jan. 15, 2019).

<sup>118</sup> Carla Hayden, Librarian of Congress, Responses to Questions for the Record, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary at 3–4 (Jan. 7, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Hayden%20Responses%20to%20QFRs.pdf>.

<sup>119</sup> Copyright Alliance Comments, at 25.

<sup>120</sup> AAP Comments, at 2.

<sup>121</sup> *Id.* at 3.

The Copyright Office is committed to pursuing any updates to the registration deposit system in a reasonable and conscientious manner. At the same time, due to the wide variety of expressive works that can be registered, spanning physical and digital formats, from individual to large corporate authors, the ECS must be designed in a manner to accommodate submission of both physical and electronic deposits.<sup>122</sup> Under the current framework, the Office has recently noted that “[a]ny future expansion of electronic deposits to additional categories of works will require careful consideration of several factors, including the Library’s collection needs, technological capabilities, and security and access issues.”<sup>123</sup> Meanwhile, the Office notes that these issues may overlap with ongoing legislative discussion.<sup>124</sup> The Office therefore has concluded that consideration of changes to the deposit requirements are beyond the scope of this current notice. As noted, however, the Office and the Library will work collaboratively to develop alternative deposit options “that appropriately balance security with ease of use. These kinds of important issues will be addressed using transparent processes that invite public comment and participation.”<sup>125</sup>

## **II Additional Subjects of Inquiry**

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<sup>122</sup> The current statutory default instructs owners to submit a deposit of a complete copy of the work and, for works published in the U.S., the best edition of that work (unless regulations permit the deposit of alternate identifying material). 17 U.S.C. 407, 408; 83 FR at 52344. But the statute does not compel authors or publishers to create a special copy for the purpose of copyright registration or to fulfill the separate obligation under section 407. *See* Mandatory Deposit of Electronic-Only Books, 83 FR 16269, 16274 (notice of proposed rulemaking).

<sup>123</sup> Jody Harry, Chief Financial Officer, U.S. Copyright Office, Responses to Questions for the Record, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary at 13 (Dec. 17, 2019), <https://www.judiciary.senate.gov/imo/media/doc/Harry%20Responses%20to%20QFRs.pdf>.

<sup>124</sup> Carla Hayden, Librarian of Congress, Responses to Questions for the Record, Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary at 3 (Jan. 7, 2020), <https://www.judiciary.senate.gov/imo/media/doc/Hayden%20Responses%20to%20QFRs.pdf> (responding to question about draft legislation on the deposit requirement).

<sup>125</sup> *Id.*; *see also id.* at 4 (“The Library would like to work closely with the Copyright Office to update the best edition statement on a consistent and regular basis.”).

In addition to the foregoing practice changes, the Office is continuing to consider additional issues raised in the 2018 NOI and now seeks further comment on the following topics.

#### **A) The Rights and Permissions Field**

Presently, at the conclusion of an online registration application, the applicant is asked to provide Rights and Permissions information, which may include “the name, address, and other contact information for the person and/or organization that should be contacted for permission to use the work.”<sup>126</sup> Currently, applicants may provide only one name and address. This information appears in the online public record for the work to facilitate licensing and similar transactions.<sup>127</sup> Once a certificate of registration is issued, interested parties may update the Rights and Permissions information by either (1) requesting that the Office remove certain personally identifiable information from the online public record and replace it with substitute information,<sup>128</sup> or (2) submitting an application for a supplementary registration.<sup>129</sup>

To achieve a more flexible amendment process, the 2018 NOI proposed allowing users to update Rights and Permissions information, as necessary, without having to submit a formal written removal request and fee and without having to seek a supplementary registration.<sup>130</sup> The overwhelming majority of commenters supported this

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<sup>126</sup> *Compendium (Third)* sec. 622.1. There is no corresponding space for providing Rights and Permissions information in a paper application.

<sup>127</sup> *Id.*

<sup>128</sup> 37 CFR 201.2(e)(1); *Compendium (Third)* sec. 622.1. *See generally* Removal of Personally Identifiable Information from Registration Records, 82 FR 9004 (Feb. 2, 2017) (final rule).

<sup>129</sup> 37 CFR 202.6(d), (e); *Compendium (Third)* sec. 1802.

<sup>130</sup> 83 FR at 52341–42.

proposal.<sup>131</sup> AALL noted that it would “better ensure that the information remains up-to-date, thereby reducing the risk of a work becoming an orphan work, encouraging proper attribution by others, and facilitating users [in] properly obtaining permission or a license to use a work.”<sup>132</sup> Authors Alliance similarly noted that “the costs associated with updating the Rights and Permissions field discourages users from updating contact information, leading to inaccurate records and contributing to the orphan works problem.”<sup>133</sup>

While there was general support for this proposed change, several commenters noted the importance of implementing a corresponding method for authenticating or confirming the identity of registrants, assignees, or their authorized representatives. RIAA stated there must be “robust security and authentication surrounding the authorized user’s credentials and access to the registration database.”<sup>134</sup> Likewise, the Copyright Alliance suggested that “[t]he ability to make these changes should be restricted to accounts belonging to the rights holder (including a previous rights holder’s verified successor in interest) or their agent” to protect “rights holders and users of the public

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<sup>131</sup> ABA-IPL Comments, at 6 (“[T]he Section supports allowing registrants to update the Rights and Permissions information for their works posted on the public record in a simplified manner”); AIPLA Comments, at 5 (“AIPLA supports allowing authorized users to make changes to this field”); Authors Alliance Comments, at 4 (“Authors Alliance supports the Office’s efforts to build a registration interface that allows users to update Rights and Permissions information without having to submit a supplementary registration together with the associated fee”); INTA Comments, at 9 (“INTA strongly supports making the Online Public Record a more dynamic system by allowing authorized representatives to update rights and permission information”); NMA Comments, at 5 (“The Alliance supports the proposal to allow authorized users to make changes to the Rights and Permissions field in a completed registration”).

<sup>132</sup> AALL Comments, at 3.

<sup>133</sup> Authors Alliance Comments, at 4.

<sup>134</sup> RIAA Comments, at 6.

record from fraud, misrepresentation, inadvertent mistakes and unauthorized changes to the record by third parties.”<sup>135</sup>

In principle, the Office agrees that the ECS should be designed to encourage copyright owners to keep their contact information up to date, including in cases of transfer, and also that security and access controls will be key to implementing self-service edits.<sup>136</sup> The Office seeks additional stakeholder feedback on how the ECS might administer such a service. Specifically, what eligibility criteria should be considered in evaluating the parties seeking to edit Rights and Permissions information? Should this service be limited to users with access to the account through which the original registration was made, or should those users be able to consent or transfer account authorizations associated with individual registrations? Should this service be limited to parties named on the registration certificate and their authorized agents? The Office also seeks stakeholder feedback on whether to expand the Rights and Permissions field to allow users to provide more than one name and address. The Office will share this information with the OCIO to explore technological feasibility, and both the Office and the OCIO have committed to facilitating communication and outreach with users of the prospective system.

## **B) Additional Data**

The 2018 NOI invited comment on what additional data could or should be included in the online registration record on a voluntary basis in order to enhance the

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<sup>135</sup> Copyright Alliance Comments, at 19.

<sup>136</sup> The option to edit Rights and Permissions information will not affect the recordation of documents pertaining to copyright. Rights and Permissions information is limited to contact information (*e.g.*, mailing and/or email addresses).

functionality and value of the system.<sup>137</sup> The 2018 NOI noted that the current system already allows applicants to include a number of unique identifiers, including an International Standard Book Number (“ISBN”), International Standard Recording Code (“ISRC”), International Standard Serial Number (“ISSN”), International Standard Audiovisual Number (“ISAN”), International Standard Music Number (“ISMN”), International Standard Musical Work Code (“ISWC”), International Standard Text Code (“ISTC”), or Entertainment Identifier Registry number (“EIDR”).<sup>138</sup> The 2018 NOI inquired whether the Office should consider expanding the number of unique identifiers that may be included on an application, requiring inclusion of unique identifiers if they have been assigned, or establishing a procedure for adding unique identifiers to completed registration records, similar to the proposed procedure for updating the Rights and Permission field.<sup>139</sup>

Commenters were in favor of having the option to submit additional data as part of the registration application, as long as adding such information is not made mandatory.<sup>140</sup> Commenters were also in favor of being able to provide unique identifiers to pending and completed registration records, on an optional basis.<sup>141</sup> The Office agrees that any new requests for information should not be mandatory. Recognizing that certain standard identifiers may not always be available at the time of the registration application, the Office also appreciates the desire to add identifiers to the record after submission of a registration application, provided the online public record identifies when such amendments are made to completed registration records. The acceptance of post-registration unique identifiers would

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<sup>137</sup> 83 FR at 52342.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See ABA-IPL Comments, at 6; AIPLA Comments, at 6; AAP Comments, at 7; AMI Comments, at 7; Copyright Alliance Comments, at 20; Copyright Clearance Center, Inc. Comments, at 2 (Jan. 14, 2019); GAG Comments, at 8; INTA Comments, at 9; Shaftel & Schmelzer Comments, at 17 (Jan. 11, 2019).

<sup>141</sup> See Copyright Alliance Comments, at 20; INTA Comments, at 9; MPAA Comments, at 10.

seem to potentially raise eligibility questions similarly presented with post-registration updates to the rights and permissions field, discussed above. Subject to additional public comment, the Office will work with the OCIO to explore the best ways to enable these types of voluntary submissions in the ECS.

In addition, the Office sought comment on whether it should allow applicants to voluntarily upload public-facing deposit material, such as low-resolution images or sound bites, as part of the registration application.<sup>142</sup> The option to include this information would be additive of the existing registration deposit requirement. Such public-facing material might assist in the identification of a work to serve licensing, or even enforcement, purposes. Commenters generally were supportive of this proposal. INTA opined that “developing a more robust Online Public Record through the uploading of these images and clips will be beneficial by enhancing recognition of the work registered and will also aid in the licensing of those works.”<sup>143</sup> NMPA observed that “[a]llowing applicants to include small sound bites of their works in their application could improve the public record and assist the public in identifying copyright owners.”<sup>144</sup> Public Knowledge (“PK”) and the Association of Real Estate Photographers (“AREP”) suggested that “[i]mplementing reverse image search capabilities . . . —and linking those results to rightsholder information—would prov[ide] significant benefits for both users and rightsholders.”<sup>145</sup> Noting that “[t]he technology to search by images . . . is widely

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<sup>142</sup> 83 FR at 52342.

<sup>143</sup> INTA Comments, at 9–10.

<sup>144</sup> NMPA Comments, at 15.

<sup>145</sup> PK & AREP Comments, at 3 (Jan. 15, 2019).

commercially available,” PK and AREP stated that the ability to “reverse image search existing registrations would assist photographers . . . in protecting their rights online.”<sup>146</sup>

Other commenters, however, noted that there may be complications in accepting low-resolution or incomplete deposits. Specifically, RIAA argued that collecting sound clips “would create additional burdens (including, but not limited to, the need to provide ever expanding storage resources for clips) on the Office with, at best, marginal increased utility.”<sup>147</sup> It also expressed concern that “the collection and inclusion of sound clips in the Office’s registration database could turn the database into a de facto, on-demand streaming service that would effectively compete against commercial services licensed by our member companies.”<sup>148</sup>

Still others discussed the availability of technology to create low-resolution or incomplete copies. For example, ImageRights suggested that there would be “little point in asking users to provide” low-resolution images and sound bites because they “can be created sufficiently well in an automated way.”<sup>149</sup> GiantSteps Media Technology Strategies suggested that the Office use digital finger printing technology to “allow registrants to deposit digital fingerprints of works, perhaps in addition to low-resolution images, audio clips, and the like.”<sup>150</sup>

To more fully explore these issues, the Office is interested in receiving additional input on whether and how the new ECS might be designed to include the option to deposit low-resolution or incomplete copies of works for the online public record. Are

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<sup>146</sup> *Id.*

<sup>147</sup> RIAA Comments, at 6–7.

<sup>148</sup> *Id.* at 7.

<sup>149</sup> ImageRights Comments, at 8.

<sup>150</sup> GiantSteps Media Technology Strategies Comments, at 3 (Jan. 15, 2019).

there certain available technologies that should be considered to automate creation of lower-resolution or shortened clips works to be made available to the public for identification purposes but that would not serve as a substitute for the work? Should the Office establish specifications, such as a 15-second limit on sound clips, or a specific resolution format, with respect to the acceptance of additional, voluntarily submitted data, to minimize interactions with licensing markets? Should this feature be preliminarily explored in a pilot limited to certain type(s) of works, and if so, which type(s)?

The Office invites comment on any additional considerations it should take into account relating to these topics.

**Dated:** February 28, 2020.

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