



COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE REGARDING DEFERRED REGISTRATION EXAMINATION

The Library Copyright Alliance (“LCA”) consists of three major U.S. library associations: the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. LCA welcomes the opportunity to respond to the Copyright Office’s notice of inquiry (“NOI”) concerning the merits of providing an option to defer examination of copyright registration application materials until a later request by the applicant. LCA opposes the creation of a deferred examination option particularly because of its adverse impact on deposits for the collection of the Library of Congress.

Furthermore, underlying proposals for deferred examination is an implicit belief that copyright registration is not important: that it imposes a burden on rightsholders that exceeds any benefit to them. This, in turn, reflects an implicit belief that the copyright system exists to serve primarily rightsholders, rather than the many stakeholders comprising the public. LCA, however, approaches this issue with an understanding that the constitutional purpose of copyright is to benefit the public by promoting the creation and dissemination of copyrighted works. Examination in the course of registration benefits the public objectives of the copyright system in at least two ways. First, it ensures the creation of an accurate public record which facilitates licensing and the delineation of the public domain. Second, it resolves a host of technical issues, thereby reducing the burden on litigants and the courts.

Additionally, due to the Office’s modernization efforts, the “burden” registration places on applicants is much lighter than in the past. Online registration is far more convenient to applicants, and the Office has dramatically reduced the time it takes to process registration applications—thanks to its efforts to streamline processes.

I. Deposit

Adoption of a deferred examination system would interfere with deposit of copies of monographs in the Library of Congress. Currently, the Copyright Office regulations require an applicant submitting a physical deposit of a monograph with her registration application to provide a single deposit copy. This copy is made available to the Library of Congress once the examination, and registration, are completed. The Copyright Office thus retains the copy only for a few months, while the application is pending.

But under a deferred examination system, the Copyright Office likely would have to retain the deposit copy for a much longer period because it would need the deposit in the event the applicant requests examination in order to pursue infringement litigation. This means the Copyright Office would have to store a large number of physical copies for an indefinite time; and the copies would not be available to the Library of Congress for that entire duration. This unfortunate result could be mitigated if the deposit copy were made available to the Library once the initial registration was processed, and the applicant was required to deposit an identical copy with the Office when she requested examination.

II. Harm to the Public Record

Deferred examination would be devastating to the creation of an accurate public record, an objective consistent with the mission of libraries. The Copyright Office corresponds with fully 25 percent of applicants to resolve issues that arise during examination.¹ Stated differently, there is a potential error rate of 25 percent in applications submitted to the Copyright Office. The issues that routinely arise in the course of examination relate to the nature and scope of the work being examined, authorship, and deposit.²

These critical questions arise with respect to approximately 125,000 of the 500,000 copyright registration applications submitted to the Office each year. On average, fewer than 5,000 copyright infringement cases are filed annually.³ Under a deferred examination system in which examination did not occur unless the copyright owner intended to initiate copyright infringement litigation, the errors in over 120,000 applications annually would never be detected. These errors would persist in the official records of the Copyright Office, which in turn would undermine the following useful functions of these records:

The registration system establishes a historical public record of creativity in the country and provides information about the trends in creativity. Registration systems also establish an important public starting point for rights and permissions information. While not all works created and fixed are necessarily intended to be commercially exploited, a registration and the resulting public record can establish an interest in paternity and a means to permission, licensing, for various forms of lawful commercial exploitation. Together with the

¹ See Robert J. Kasunic, *The Benefits of Registration*, 68 J. Copyright Socy. USA 83, 89 (2021).

² For a more detailed list of questions, see Kasunic at 93-110.

³ Administrative Office of the United States Courts, *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark* (2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.

recording system, registration records can also establish the essential first link in a chain of title that is essential for virtually all property-based systems.⁴

III. Adverse Impact on Litigation

Under the deferred examination system envisioned by the NOI, examination would still occur before a copyright owner could initiate litigation. Congress has recognized that examination streamlines infringement litigation and keeps marginal claims out of court.⁵ Likewise, the Register of Copyrights has stated that “the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law.”⁶ In particular, resolving technical registration questions

with the Office prior to initiating an infringement claim assists courts in identifying relevant issues and possibly resolving inconsistencies that could cause confusion in the litigation even when they may not be germane to the central issues in the litigation. Copyright infringement actions involve a host of other issues not addressed by the Office, such as circumstantial evidence of copying and improper appropriation of copyrightable elements of the plaintiff’s work. By resolving certain legal and technical issues through the registration examination process, the Office assists the courts by allowing them to focus on the issues that need to be decided.⁷

While these benefits would not be completely lost by a deferred examination system that still required examination prior to litigation, they would be somewhat diluted. Under the current system, examinations can resolve misunderstandings about the scope of protection and authorship early in the lifecycle of a work, before litigators have been hired, cease-and-desist letters have been sent, and positions have become entrenched. But if the examination is deferred until after the copyright owner has already decided to initiate litigation, it might be difficult to narrow the issues or avoid litigation altogether.

Further, the deferred examination system described in the NOI would allow the award of statutory damages for infringements that occurred long before the date the registration was completed. Once the Office registered the work after an examination, the effective date of registration would be backdated to the date the original deferred examination application was received, which could be months or even years before the infringement. This would compound

⁴ Kasunic at 111-12.

⁵ See H.R. Rep. No. 100-609, at 41–42 (1988).

⁶ Staff of H.R. Comm. on the Judiciary, 87th Cong., Report of the Register of Copyright on the General Revision of the U.S. Copyright Law 75 (Comm. Print 1961).

⁷ Kasunic at 110-11.

the existing unfairness of the statutory damages framework. Currently, a user would be—at least in theory—on notice with respect to the scope of an examined copyright claim before engaging in infringing activity that could trigger statutory damages. In contrast, under the deferred examination system described in the NOI, the user could be liable for statutory damages for an infringement that occurred only with the notice provided by a potentially defective registration.

Finally, deferred examination could harm the rightsholder by delaying when she could bring an infringement action. Currently, a rightsholder who is commercializing a work has an incentive to register her work promptly in order to become eligible for statutory damages and attorneys' fees. Given the dramatic improvements in the Office's registration processing time, the rightsholder would be able to bring suit soon after detecting possible infringement. Conversely, the reduced fee of a deferred examination might induce the copyright owner to forgo the examination. Once she detects an infringement, she must either incur the added cost of expedited registration, or wait several months until the Copyright Office examines the work and completes the registration. In other words, deferred examination might encourage rightsholders to be penny-wise and dollar foolish.

IV. Copyright Office Modernization

As noted above, the Copyright Office through its modernization effort has significantly cut the time necessary to process registrations. This alone greatly diminishes the need to institute deferred examination, which would add complexity to the registration system.

Additionally, the Office is in the process of revamping the registration system for the twenty-first century.⁸ Records will be linked, certificates of registration and refusal will be available online, contact information could be updated at low cost, and statistics could be generated easily. The usefulness of the improvements made through this revamping would be diminished if 25 percent of the registrations contain errors. Moreover, adopting a deferred examination system would require redesigning the ongoing registration modernization efforts, thereby delaying them further.

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In addition to these problems, the revenue impact of a deferred examination system on the Copyright Office is unclear. At present, registration fees cover roughly 40 percent of the Office's budget. If fees are reduced for the initial registration, the revenue from registration would drop sharply. It is speculative whether the revenue drop would be offset by an increase in the number of registrations due to the lower fees; or a decrease in costs if the number of

⁸ See Kasunic at 112-16.

examiners is reduced. Another unknown is the impact Copyright Claims Board proceedings will have on registration and litigation practice. The availability of statutory damages in CCB proceedings for infringements that occur prior to registration, and the ability to initiate CCB actions prior to the Office registering a work, could dramatically reduce the number of registration applications. Accordingly, further consideration of deferred examination should be deferred until the impact of CCB proceedings on registration practice becomes apparent.

Respectfully submitted,

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January 24, 2022