



American Intellectual Property Law Association

June 1, 2020

Maria Strong
Acting Register of Copyrights
United States Copyright Office
Library of Congress
101 Independence Ave, SE
Washington, DC 20559

Submitted electronically at www.copyright.gov/rulemaking/reg-modernization/.

**Re: Comments on Registration Modernization Submitted Pursuant to
“Notification of Inquiry,” 85 Fed. Reg. 12704 (March 3, 2020)**

Dear Acting Register Strong:

The American Intellectual Property Law Association (“AIPLA”) is pleased to offer comments in response to the United States Copyright Office (the “Office”) Notification of Inquiry, 85 Fed. Reg. 12704, issued March 3, 2020, concerning various proposed efforts to modernize the Office (“NOI”).

AIPLA is a national bar association of approximately 12,000 members engaged in private and corporate practice, in government service, and in the academic community. AIPLA members represent a diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, unfair competition, and trade secret law, as well as other fields of intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention and authorship while balancing the public’s interest in healthy competition, reasonable costs, and basic fairness.

AIPLA supports and appreciates the Copyright Office’s efforts to modernize the copyright registration system. In particular, we believe that a robust public record of registrations will benefit authors and copyright owners by enabling them to better and more easily receive the economic benefits of their creative works, thus incentivizing registration. An easily searchable database of recordings would enable users to understand not only what has been registered, but also the past and current owners of registrations, and associated rights and permission information.

In addition to these general points, AIPLA comments on the practice changes suggested with respect to the online public record, and offers answers below to the additional questions set forth in the NOI.

Comments - Online Public Record: How Users Engage and Manage Copyright Office Records

AIPLA supports the policy stated in the NOI that no category of documents in the registration records should be excluded from the online public record. In particular, all documents exchanged between an applicant or copyright owner and the Office should be included, and there should be no exclusion based on a categorization of a document as being informal. (It is recognized that there may be some internal “administration information” that may not be included in the record.)

In particular, AIPLA supports the Office’s decision that the online public record should not be limited to include only records of what has been registered by the Office. Not only should documents in the registration records generally be made available online, they should be made available online relatively promptly, even while an application for registration is being processed, so that users can see the status and progress of an application.¹ It would be problematic if documents were initially included in, and then removed from, the online public record. Furthermore, an IT process of placing documents in the online public record on a rolling basis while an application is pending can be automated to minimize possible delay in making the documents available to the public. The online publication of the records of applications for registration also facilitates transactions involving those applications, because it avoids the need to identify the resulting registration numbers if a unified case number is adopted.

AIPLA also supports the proposal for a unified case number and for the linking of registration and recordation records. In particular, it would be beneficial if the unified case number had a base that is commonly used for a pending application for registration as well as the registration number. The NOI suggests that a two-letter prefix, indicating the administrative class of type of registration (such as PA for a performing arts work), might be used to distinguish between an application and a registration number. But such a prefix might be confusing because the work remains a performing arts work both during the application’s pendency and after registration. While such a prefix might be useful, it should not be used to distinguish between a pending application and a registration. Perhaps a suffix could be used to indicate the distinction. Some organizations, such as the World Intellectual Property Organization (“WIPO”), use suffixes to distinguish between pending applications and applications that have been approved. For example, PA-12345A could be the number for a pending application and PA-12345B could be the number for the registration.

It sometimes happens that transactions, such as assignments, are negotiated for a portfolio listing of works, some of which are registered, some of which are pending applications for registration, and some of which may be unregistered and not the subject of a pending application for registration. One or more applications for registration may be approved and the work registered between the time the document and portfolio are first put together, and the transaction document is ultimately recorded. It should be sufficient that, if the recorded document identifies the base of a unified case number then it should be effective with respect to the records sharing the base of the unified case number. This way the parties do not have to concern themselves with having to check the status of an application for registration, and perhaps having to go back

¹ We are not suggesting that the Office change any rules for confidential or screened treatment of those portions of applications, including deposit materials, that qualify for such treatment. Only public materials, without confidential or screened portions, should be made available online.

and change the portfolio listing, and re-execute the document, before recording the document. A recorded document listing pending Application No. PA-12345A would be automatically applicable to Registration Number PA-12345B.

AIPLA agrees that the Office should not “itself engage in chain-of-title analysis.” But it is vital that the searchable database of recordation documents should, by reliance on the recorded documents, determine the ownership, rights and permissions of works appropriately identified, such as by the unified case number. While the Office has no authority to compel parties to record transfer documents, it can condition the right of a party to make changes to the Rights and Permissions Field as discussed below, on the recordation of a document purporting to transfer rights and permissions to that party.

Responses to Additional Subjects of Inquiry

Inquiry 1. The Rights and Permissions Field: What eligibility criteria should be considered in evaluating the parties seeking to edit Rights and Permissions information?

AIPLA supports allowing either the registrant or the assignee in a recorded transfer (or their authorized attorneys) to make changes to the Rights and Permissions Field. But third parties should not be able to make changes in order to guard against problematic or fraudulent changes seeking to cause disruption or uncertainty. A limitation to the parties involved in the transaction enables registrants and recorded assignees to freely license their copyrighted work, which would accordingly incentivize registration.

Inquiry 2. The Rights and Permissions Field: 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 authorization associated with individual registrations?

Only users with access to an account related to a transaction should be able to make changes to the Rights and Permissions Field. AIPLA supports the use of accounts, with security and access controls, for controlling changes to the Rights and Permissions Field. The accounts should be associated with and confirm the identity of a party, rather than a registration or application for registration. An account should be associated with all of the individual registrations or applications for registration in which the associated party has any rights and permissions. Neither the account nor an account authorization should itself be transferred to another party.

Inquiry 3. The Rights and Permissions Field: Should this service be limited to parties named on the registration certificate and their authorized agents?

This service should not be limited to the parties named on the registration certificate and their attorneys. An assignee should also be able to make the changes once the written assignment purporting to transfer rights and permissions to them has been recorded with the Office. It is preferable that the Rights and Permissions Field is changed as soon as the transaction is recorded in the Office. A copyright assignment is often a part of a larger transaction, sometimes including financing, and the task of filing forms and papers is sometimes left to the assignee since they have the vested financial interest in the work and wish to ensure that the transaction is completed as soon as practical.

Inquiry 4. Should the Rights and Permissions Field be expanded to allow users to provide more than one name and address?

The service should allow more than one name and address to be provided in the Rights and Permissions Field. There may be more than one party having rights and permissions to a copyrighted work. So long as the rights and permissions of a party are set forth in a document recorded with the Office, the name and address of the party should be included in the Rights and Permissions Field. Such records are vital for purposes of litigation, licensing, and due diligence among other circumstances.

Inquiry 5. Additional Data: How might the new ECS be designed to include the option to deposit low resolution or incomplete copies of works for the online public record?

AIPLA cautions the Office to carefully weigh the additional burdens such an option would place upon it (including, but not limited to, the need to support a variety of file formats (including multimedia file formats), some of which may become obsolete over time) with whatever increased utility such copies would provide. It should not be permitted to delay, or risk the delay of, the modernization of the system which is now urgently needed. However, if certain groups of creators feel strongly about including this functionality – on a strictly optional basis – as part of the new ECS, it makes sense either to include such functionality as part of the initial design of the new system or to build the new system so that such functionality can be added easily in the future. Should the Office decide to include such optional functionality, it is essential that it include appropriate security to protect such copies from unauthorized use since even short clips and incomplete copies of works frequently have commercial value.

Inquiry 6. Automatically Created Additional Data: Are there certain 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?

Because even low resolution or incomplete copies of works included in the public record portray that work to the public and because the inclusion of such copies in the public record may invite unauthorized use by members of the public, we believe that owners who choose to provide such copies to the Office should be able to select the particular sample of the work to be included in the public record. We would not object to offering owners who opt to provide the sample with the further option to self-select the portion of the work to be included or to allow the Office to select a sample for them using some sort of automated technology.

Inquiry 7. Voluntarily Submitted Data: 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?

The inclusion of additional voluntarily submitted data has the potential to interfere with established (or new) licensing markets. In many creative industries, there is an active, revenue-generating business associated with licensing clips and/or samples. One way to avoid this problem is to ensure that the submission of samples always remains optional. That way,

copyright owners who believe that their licensing opportunities would be adversely affected by the inclusion of samples (or other additional data) in the public record could simply choose not to provide such materials. There are vibrant licensing markets in certain industries even for very short samples.

From a technical perspective, format generally refers to a particular engineering standard or file format, such as JPEGs for pictures, H.264/AVC in MP4 files for video, MP3s for sound recordings, etc. Resolution, on the other hand, typically refers to fidelity or the display quality and the degree to which the quality of the original rendering has been degraded. Inclusion of low-resolution samples in the Office's database is not without its problems. For one thing, creators may be concerned that degraded samples of their works in a publicly available database would reflect poorly on the quality of their work. More importantly, it is a fairly trivial matter to design and distribute an app or utility program that quickly and easily restores some or most of the resolution that was degraded before submission to the Copyright Office.

AIPLA does not, at this time, support the proposal to include samples and other additional voluntarily submitted data due to the technological complexities. It should not be permitted to delay, or risk the delay of, the modernization which is now urgently needed. Another possibility is for the Office to attempt to identify the industries that are most interested in this new option (e.g., photography and visual arts) and work with those industries to figure out how or whether the Office should adopt one or more specific resolution formats.

Inquiry 8. Pilot Program: Should this feature be preliminarily explored in a pilot limited to certain type(s) of works, and if so, which type(s)?

To the extent that there is interest in such a feature to enable reverse image search of the Office's registration database so that third parties can more easily identify and locate the owner of a copyrighted work, implementing a narrow pilot program would seem appropriate. It is not clear to us that other types of copyrighted works, such as movies, sound recordings, musical works, or even videogames, encounter similar challenges with respect to identifying and/or locating the copyright owner. The advantage of starting with a pilot program, limited to only those industries who see this as worthwhile, is that it would give the Office an opportunity to determine the various issues, whether technical, financial or practical, that would have to be addressed in order to make such an option available for all types of copyrighted works. Indeed, the experience from such a pilot program could form the basis for a more targeted notification of inquiry on this topic in the future.

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Conclusion

AIPLA greatly appreciates the opportunity to submit these views to the Copyright Office for its consideration. We would of course gladly address any of these items further at the Office's request.

Sincerely,

A handwritten signature in blue ink that reads "Barbara A. Fiocco". The signature is written in a cursive style with a large initial 'B'.

Barbara A. Fiocco

President

American Intellectual Property Law Association