

AIPLA

American Intellectual Property Law Association

January 15, 2019

Submitted electronically at www.regulations.gov

Karen A. Temple
Acting Register of Copyrights
United States Copyright Office
Library of Congress
101 Independence Ave, SE
Washington, DC 20559

Re: Comments Submitted Pursuant to “Notification of Inquiry,” 83 Fed. Reg. 52336 (Oct. 17, 2018)

Dear Acting Register Temple:

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, 83 Fed. Reg. 52336, issued October 17, 2018, concerning various proposed efforts to modernize the registration process (NOI).

AIPLA is a national bar association of approximately 13,500 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 generally, and the application process specifically. Put simply, AIPLA favors measures that encourage copyright registration, such as those that: simplify and streamline the application process; make registration economically feasible for both individuals and corporations alike; and facilitate faster examination by the Office. AIPLA also strongly believes that a robust Online Public Record will incentivize registration. A meaningfully searchable database that enables users to understand what has been registered and by whom, that includes file histories, that links registrations to related records, and that features up-to-date rights and permission information is paramount.

In addition to these general points, AIPLA offers answers below to only certain of the enumerated questions set forth in the in NOI.

Responses to Specific Queries

Question 1. New Solutions for Delivering Application Assistance: How should the Office integrate in-application support and assistance to users of the electronic registration system?

AIPLA supports the provision of in-application support and assistance to users of the electronic registration system by means of live-chat with an Office Examiner, especially as to questions that cannot be explained by existing or future “self-help” solutions (e.g., sample completed application forms, application FAQs, online guides, and an assistance “hotline”). AIPLA also supports including more embedded links to provide immediate help in completing each section of the online application. We note that the USPTO’s online trademark forms contain links that, when clicked, open pop-up windows with additional information and guidance, and this works very well in our experience and could provide a helpful model.

Lastly, AIPLA supports allowing users of the electronic registration system to preview and correct, and to download, save, and share, completed or partially-completed applications, so that user-errors can be reduced through self-correction and proofing prior to filing.

Question 2. Electronic Applications and Payments: Should the Office mandate the use of electronic applications and payments, and eliminate the paper application and payment options via check or money order?

AIPLA does not believe that electronic applications and payments should be mandatory but supports changes to the system that encourage and facilitate electronic application and payment. While computers and broadband internet access are common, they are not ubiquitous.¹ Moreover, technology 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).

With regard to electronic payment, AIPLA favors deposit accounts for more frequent filers, to make Copyright Office payments easier and avoid lost time from having to use other payment methods. Single and small user filers, however, need to be accommodated by other payment options. If possible, electronic payment is most expedient, particularly credit and debit cards. In this regard, we note that the current payment options (credit/debit card or ACH transfer via Pay.gov or payment through a deposit account) work well. If a non-electronic payment is used, the filer needs to be alerted to the fact that the registration will not be deemed complete until the payment is received. The filer must also be made aware of and instructed to use any process adopted by the Office to match the physical payments with the registrations to which they apply.

¹ See, e.g., <https://www.fcc.gov/about-fcc/fcc-initiatives/bridging-digital-divide-all-americans> (“In urban areas, 97% of Americans have access to high-speed fixed service. In rural areas, that number falls to 65%. And on Tribal lands, barely 60% have access. All told, nearly 30 million Americans cannot reap the benefits of the digital age.”).

Question 4. Dynamic Pricing Models: Should the Office replace the Single, Standard and Group applications with a dynamic pricing model that scales fees based on the number and type of works submitted for registration?

AIPLA supports an expansion of the group registration/bulk-filing option, particularly for iterative works such as source code for software, websites, regularly broadcast/streamed programs, architectural drawings, and catalogues. Authors and owners of these types of works often do not seek registration because doing so is not practical or cost-effective.

AIPLA also supports adjustments to the Copyright Office fee structure to permit lower application costs for a proven small-entity or individual filer. This would act as an additional incentive for occasional authors to participate in the registration system. In considering how to structure such a system, the Office may wish to consult with the USPTO, which distinguishes between different types of applicants for purposes of assessing fees for patent applications.

Finally, the United States Supreme Court is poised to decide whether the “registration of [a] copyright claim has been made” within the meaning of 17 U.S.C. § 411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office, as the U.S. Courts of Appeal for the 5th and 9th Circuits have held, or only once the Copyright Office acts on that application, as the U.S. Courts of Appeals for the 10th and, in the decision below, the 11th Circuits have held.² If the Court adopts the application approach for standing to sue under Section 411 of the Copyright Act, it will be important that the payment options are clear so an applicant does not lose standing to sue because of paying the wrong application fee (which could happen if a claim is filed on the eve of a limitations period on an application that ultimately gets rejected months later for failure to pay the correct application fee). For this reason, complex payment structures with scaling options may be inadvisable, or perhaps improper filing fees should be made curable.

Question 5. Authorship Statements and Administrative Classifications: Should the Office eliminate the Author Created and Nature of Authorship sections of the application, and instead, require the applicant to identify the work being submitted for registration, rather than the elements of authorship contained in the work?

AIPLA believes that the current administrative classifications for registration could be augmented and updated to reflect the breadth of copyrightable works today and allow an applicant to determine more easily which classification covers his or her work. Instructions for use could contain examples of common works paired with the appropriate classifications. Providing an index of registerable works and the classification to which they generally belong may also speed the application and examination processes as well as provide a means to remain current as new forms of expression are invented. A definition of the classification can also include the typical copyrightable elements that are covered, again so the applicant can better match the nature of authorship with his or her contributions.

The Office should not, however, eliminate the Author Created and Nature of Authorship sections of the application altogether. Replacing the “Author Created” and the “Nature of

² *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707, 201 L. Ed. 2d 1095 (2018).

Authorship” sections of the application with an applicant’s self-drafted statement of authorship risks adding confusion, reducing or overstating the scope of protection, and in general creating more work for the examiners. In a self-drafted statement, there is a possibility that the author will fail to mention one or more otherwise protectable elements. By using a more narrowly tailored classification system where all protectable elements are assumed to be included in the claim unless expressly disclaimed, this omission is less likely to occur. Further, an applicant’s own statement may contain unfamiliar terminology that will confuse or mislead people reviewing the application, including the examiner. Conversely, if the applicant makes a claim that is too broad, such as “entire work,” it may be time consuming for the examiner to delineate any material in the work that is not subject to copyright protection.

Question 6. Derivative Works: Should the Office require users to explicitly identify whether a work submitted for registration is a derivative work?

AIPLA believes that applicants should be required to identify whether the work submitted for registration is a derivative work; however, we also encourage the Office to rework this aspect of the application to provide more guidance to applicants. Applicants often do not understand that certain elements of their works need to be disclaimed, or how to identify such elements.

AIPLA therefore supports the proposal in the NOI to eliminate the checkboxes in the “Material Excluded” field and ask applicants to state whether the work submitted for registration is a derivative work (or, rather, whether it is based on a preexisting work). AIPLA further supports allowing applicants to describe those elements that should be excluded (free form, in their own words). AIPLA suggests that it may be helpful to guide applicants through this process by presenting a series of questions in a wizard-like format. The first question might ask whether the applied-for work is based on one or more preexisting works. If the applicant answers yes, then the form should prompt the applicant to identify and describe those materials in their own words. If an applicant answers the first question affirmatively but leaves the second question blank, a warning should appear pointing out that this is inconsistent and that submitting an application with inconsistent fields may result in delays or longer processing times. (If an applicant answers no, but then fills in an answer to the second question, the first answer should be changed to yes automatically.) The purpose of the first question is merely to assist and encourage applicants to answer the second where appropriate.

AIPLA agrees that asking the applicant to identify the new authorship is unnecessary, that the applicant’s selection of the classification for the applied-for work satisfies the statutory requirements, and that the Office should assume that the applicant intends to register all copyrightable aspects of the work. The Office should require the applicant to identify explicitly all work excluded from the claim, however, particularly where the original elements of the derivative work are intertwined with those of a pre-existing work or if portions of the derivative work are in the public domain.

As noted in response to Question 1, embedding links leading to additional information, perhaps in pop-up windows, should help to facilitate the application process. The fields involved here offer a good example. “One or more preexisting works” in the first proposed question might lead to a window with a paragraph explaining what this means. The second question might be

accompanied by a link to examples of ways to answer the prompt based on well-known works or common scenarios.

Question 7. Simplifying Transfer Statements: Should the Office restrict the transfer statement options to “by written agreement,” “by inheritance,” and “by operation of law”?

AIPLA agrees that the proposal set forth in the NOI better mirrors the law and should avoid unnecessary delays caused by unacceptable answers. AIPLA suggests that “by written agreement,” “by inheritance,” and “by operation of law” should be linked to definitions and examples for clarification purposes.

Question 8. In-Process Corrections: Should the Office permit applicants to make in-process edits to open cases prior to the examination of the application materials?

AIPLA supports permitting applicants to make edits to pending applications in most circumstances. However, in the event that the Supreme Court determines that a registrant’s standing lies upon the filing of an application (*see* note 2, *supra*), consideration should be given as to whether in-process edits might prejudice a defendant in an infringement action. Indeed, it may be sensible to revisit this question following the Court’s decision in *Fourth Estate*. For example, if an applicant files a copyright infringement suit on a recently filed application near the conclusion of the Copyright Act’s three-year statute of limitations period, and the alleged infringer seeks to dismiss the case based on defects in the application, the Office should consider whether allowing edits to pending applications would allow the applicant to cure any such defects and avoid dismissal, and whether doing so encourages an applicant to prioritize speed over accuracy in the initial application. Also, if the filing of an application were sufficient for standing and an applicant were able to edit his or her application in-process, the applicant may be able to make strategic changes to the application during the pendency of the infringement litigation.

AIPLA notes that it may be appropriate for the Office to charge a small fee structured to cover costs that the Office would potentially incur as the result of in-process edits.

Question 9. The Rights and Permissions Field: Should the Office allow authorized users to make changes to the Rights and Permission field in a completed registration?

Yes; AIPLA supports allowing authorized users to make changes to this field. This will better enable registrants to monetize their work, which would accordingly incentivize registration. Only registrants and recorded assignees (or their attorneys), however, should be permitted to authorize such changes. AIPLA also suggests that the Office provide for a mechanism for confirming the identity of a party that might be making these changes as being either the applicant or assignee.

Question 10. Additional Data: What additional data should the Office collect on applications for registration? For example, should ISBNs or other unique identifiers be mandatory? Should the Office accept other optional data?

Searching for the copyright record related to a particular work can be challenging where the researcher does not have the registration number, the title under which the work was registered, the correct name of the author, or other unique identifying information. This is particularly true for works contained in group registrations, photographic works, and where songs, movies or books are registered under working titles or where the popular name of a work is not the same as its official title. This problem regularly arises when a party seeks to clear rights to a work that the party has encountered on its own, where identifying information is not appended to the work itself. For this reason, it would be beneficial to devise search fields that may lead a person who is unaware of the author or copyright owner to the correct registration information.

Accepting unique identifiers such as ISBNs may help in some instances and should be encouraged but should not be mandatory. Mandating such information risks placing additional obstacles to registration and is therefore antithetical to a policy encouraging registration. Indeed, it can take time to obtain such identifiers and copyright applications are often urgent.

Creating a “search” field, where a copyright owner can put terms or unique identifiers that relate to the work, might be helpful. Such searchable information might include the name of a series to which the work belongs or the name of a recurring character (such as “Harry Potter” or “Sam Spade”). It could be a short phrase from the lyrics of a song or some other description of the work or snippet of well-known content. It will nevertheless remain difficult to use application information to identify owners of a particular work without copyright management information because the public is unable match a copy of the work at issue with the copy submitted with the registration. For example, a motion picture that is the subject of a registration is not part of the searchable content and cannot be compared to a video clip found on the internet. Nonetheless, a person seeking to track down copyright ownership may find useful information in one or more registration records if a lead character name from the film, for instance, is in a searchable file.

Question 12. The Online Registration Record: Should the Office expand the Online Public Record to include refusals, closures, correspondence, and appeals?

Yes; AIPLA believes that the public record information is extremely valuable to those who are interested in the status of a registration and its file history. The need for full information regarding an application and registration is often crucial for litigation, licensing, and corporate diligence, among other circumstances. Ideally, all documents that relate to an application or registration should be included in an electronic file history that should be available through the Online Public Record. For example, the USPTO has a system, Trademark Status and Document Retrieval (TSDR), which allows the public to find public records germane to an application. The TSDR information can be accessed from the Trademark Electronic Search System (TESS) page for any mark. Something similar could be very effective for finding the public records related to a copyright application.

Note that, in providing this response, AIPLA has assumed that deposit copies are not part of the Online Public Record. While ready access to deposit copies would be useful in some circumstances, such as when clearing rights or investigating claims of infringement, deposits often contain trade secret or other non-public information. Moreover, certain media (photographs, movies, books) may lose significant commercial value if made viewable by the Copyright Office.

Question 13. Linking Registration and Recordation Records: What considerations should the Office take into account in expanding the Online Public Record to connect registration and recordation records and provide chain of title information?

AIPLA believes that an interrelationship between registration and recordation records is invaluable. Similar to the issues noted above in response to Question 12, information regarding copyright ownership can be critical in litigation, licensing, and basic corporate due diligence. Accordingly, access to full information regarding a registration—including its ownership and chain of title—should be encouraged and publicly available. AIPLA notes that the USPTO TSDR system, for example, includes a category for recording trademark assignments as part of the trademark file.

Question 14. Unified Case Numbers: Should the Office issue one case number to track and identify a work or group of works through the registration and appeal process?

AIPLA strongly supports this proposal.

Additional Considerations

As the Office evaluates certain changes to the deposit requirements, AIPLA also encourages the Office to consider updating the format requirements for various works. The requirements for webpages, for instance, are cumbersome. In addition, the requirements for software programs do not take into account that many complex programs do not have a “beginning” or “end.”

AIPLA also strongly believes that the online registration system would be greatly improved by enabling users to forward a completed application to the proper signatory for electronic signature (e.g., allowing an attorney to forward an application to a client for review and signature). The system currently lacks such functionality, and effectively forces outside counsel for applicants to either sign on a client’s behalf or to create a new account for each client so counsel can provide a unique password to that client for review and signature. Neither of these scenarios is ideal. We strongly encourage the Office to adopt a model similar to that used by the Trademark Office, which allows an application to be saved and then sent to a third party for review and execution.

Finally, we believe that the system would also be improved if, upon filing, users receive filing confirmations that contain a copy of the submission (which is also a feature utilized by the Trademark Office).

AIPLA Comments Submitted Pursuant to "Notification of Inquiry," (Oct. 17, 2018)

January 15, 2019

Page 8

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, appearing to read "Sheldon H. Klein", with a stylized flourish at the end.

Sheldon H. Klein

President

American Intellectual Property Law Association