



American Intellectual Property Law Association

Honorable Karyn A. Temple
Acting Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Via: <https://www.copyright.gov/policy/feestudy2018>

Re: Comments Submitted Pursuant to “Notice of Proposed Rulemaking on Copyright Office Fees,” 83 Fed. Reg. 101 (May 24, 2018)

Dear Acting Register Temple:

The American Intellectual Property Law Association (AIPLA) offers its comments in response to the above-referenced U.S. Copyright Office Notice of Proposed Rulemaking concerning the adoption of a new fee schedule.

AIPLA is a U.S.-based national bar association with approximately 13,500 members who are primarily lawyers 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 law intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective global laws and policies that stimulate and reward invention and authorship while balancing the public’s interest in healthy competition, reasonable costs, and basic fairness.

While AIPLA recognizes the Copyright Office’s right and need to increase its fees periodically—and further recognizes that any proposed fee increase will ordinarily be met with some degree of reluctance by those incurring the increased expense—some of the Office’s proposed fee increases here raise certain questions and concerns for AIPLA members that we would like to bring to your attention. Of course, it is not possible to know with certainty how the proposed increases would impact a copyright owner’s willingness to utilize the Office’s services. Further, the Office has undertaken various initiatives in recent years, and intends to introduce others, that may increase the use and usability of its services. For these reasons, AIPLA has framed its comments below by identifying certain overarching questions or concerns from AIPLA’s review of the proposed fee increases, followed by various items to consider with regard to the proposed increases for specific fee categories. In some instances, it may be appropriate for the Copyright Office to monitor the actual effect of any higher fees after implementation to determine if the effects comport with the Office’s stated expectations and goals.

IT Plan Cost Recovery

As an initial matter, it appears that a significant driver of the proposed fee increases is to fund the Office’s Information Technology Modernization (“IT Plan”) initiative. In response to the Office’s March 1, 2016 Notice for Inquiry regarding “Information Technology Upgrades for a

Twenty-First Century Office,” AIPLA advocated that “[s]ome of the costs associated with the modernization should fall on customers of the Copyright Office’s services.”¹ Under the proposed fee schedule, the largest share of revenue will be collected from users seeking registrations. As a result, more than 67,000 applications could be lost per year due to higher fees.² Thus, while it is our understanding that the IT Plan cost estimate of \$12-\$15 million per year for the next five years is generally based on the September 1, 2017 Modified U.S. Copyright Office Provisional IT Modernization Plan, it would be useful to have more clarity on the basis for the cost estimate to allow AIPLA and others to evaluate whether a 50% recovery of IT Plan costs from fee payers is “fair and equitable” and gives “due consideration to the objectives of the copyright system”³ (as discussed below).

In addition, the IT Plan appears to be, at least in part, a one-time capital expense. There nevertheless does not appear to be any assessment made as to whether a downward adjustment of fees is necessary once the IT Plan is complete. For these reasons, AIPLA would welcome more information on the basis of the IT Plan fees, a breakdown of its costs, and guidance as to the Office’s plan with respect to fees after the IT Plan is completed.

The Objectives Served by the Copyright System

The general public has an interest in encouraging the production of copyrighted works, which is a factor that can be considered in determining what percentage of costs the Office should recover through fees.⁴ The U.S. Constitution implicitly recognizes this public interest when it directly calls on Congress to provide such protection.⁵ Even though copyright registration is not required for copyright ownership, it is part of a system that promotes the public’s interest as well as that of individual owners and users of copyrighted works. The Copyright Office has a stated policy goal of “promoting creativity and protecting creator’s rights.”⁶ As noted by the Copyright Office, registration, which includes collection of materials for the Library of Congress, “plays a vital role in fostering the country’s cultural identity.”⁷

The interests of those who own and those who use copyrighted works are, of course, also served by registration. As noted by the Copyright Office, registration and recordation “facilitate the

¹ Comments Submitted Pursuant to “Information Technology Upgrades for a Twenty-First Century Office Notice of Inquiry,” 81 Fed. Reg. 10,672 (Mar. 1, 2016), submitted by AIPLA March 31, 2016.

² See Fed. Reg. Vol 83, No. 101, at 24057 and Booz Allen Hamilton, *2017 Fee Study Report* (Dec. 2017) (“Booz Allen Study”), at 8, available at <https://www.copyright.gov/policy/feestudy2018>. Accepting the study’s elasticity determination of 3.2% decrease in demand for each 10% increase in fees and applying the proposed fee increases for standard, single, and paper filings to the 2016 volume numbers yields an estimated 67,684 reduction in the number of filers.

³ 17 U.S.C. § 708(b)(2).

⁴ “For cost-based fees, the extent to which a program provides benefits to the general public versus users and the cost of providing those benefits should, theoretically, guide how much of total program costs are paid for by user fees and the amount each user pays.” U.S. Govt. Accountability Office (GAO): Federal User Fees, A Design Guide, May 2008 (<https://www.gao.gov/assets/210/203357.pdf>).

⁵ “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Constitution, Art. I, Sec. 8, Clause 8.

⁶ Fed. Reg. Vol. 83, No. 101, at 24056.

⁷ See U.S. Copyright Office, *Proposed Schedule and Analysis of Copyright Fees to Go into Effect on or about April 1, 2014*, at 6. (Nov. 13, 2013) available at <https://www.copyright.gov/docs/newfeesUSCOFeeStudy-Nov13.pdf> (the “2014 Analysis”). The benefit of the registration system to the Library of Congress can also be measured in monetary terms. In 2016 alone, the Copyright Office transferred \$35.6 million of material received through the application process to the Library’s collection. See Booz Allen Study at 6.

marketplace for licensing and other valuable uses of works, as well as business transactions that rely on protection of copyrighted works.”⁸

Given the public and private interests in having a robust copyright registry, an important objective in setting fees should be to make registration available to as many copyright owners as possible. Of competing concern are the statutory provisions authorizing the Copyright Office to recover costs by setting fees. The statute, however, does not specify what percentage of costs must be recovered through fees. For fees covering registration and recordation, the Registrar may “adjust fees to not more than that necessary to cover the reasonable costs incurred by the Copyright Office for the services ... plus a reasonable inflation adjustment to account for any estimated increase in costs.”⁹ To support the adjustment, the Registrar must conduct a study to determine the costs incurred by the Copyright Office for the registration of claims and the recordation of documents.¹⁰ In all cases, as noted above, the fees shall be “fair and equitable and give due consideration to the objectives of the copyright system.”¹¹

Although AIPLA does not have sufficient information to substitute its own judgment for that of the Copyright Office with respect to the impact of the proposed fee increases, AIPLA has reviewed the study supporting the Copyright Office’s proposed fee adjustment and remains concerned that the proposed fees may result in a greater decrease in potential registrations than estimated. AIPLA hopes that the Office will monitor the actual impact of the proposed fees on registration and recordation volume and respond accordingly, if necessary.

Observations Relating to the Study Supporting the Proposed Fee Adjustments

The Booz Allen Study analyzed the costs incurred by the Copyright Office for each of the services for which it charges fees. The study also discussed the relative percentage of revenue derived from the most frequently used services and the price elasticity over the demand for these services. The Copyright Office then made its own adjustments to this analysis in arriving at the proposed fees.

In determining the basic costs of services, Booz Allen noted that it worked from 2016 employee time estimates for time spent on fee-related tasks. The study then noted that the Copyright Office had implemented, or in the near future was planning to implement, a variety of regulatory reforms that “are projected to increase the efficiency of various registration, recordation or licensing activities.”¹² It is unclear in the final analysis used by the Copyright Office what, if any, downward adjustments were made in the costs for services affected by these cost saving initiatives.

Further, the Copyright Office directed that IT Plan costs be included “at 50% for each fee based on volume.”¹³ It is not apparent, however, that such allocation reflects the actual amount of IT Plan costs required to provide a specific service. For example, some searching services may require more programming and training for use than would processing a basic application.

⁸ Fed. Reg. Vol. 83, No. 101, at 24056.

⁹ 17 U.S.C. § 708(b)(2).

¹⁰ *Id.* § 708(b)(1).

¹¹ *Id.* § 708(b)(4).

¹² Booz Allen Study at 5.

¹³ *Id.* at 7.

Additionally, the cost of the IT Plan was estimated as a range of \$12-\$15 million per year, but it appears that the 50% allocation is slightly over 50% of the median of the range.¹⁴

The use of 2016 time estimates potentially without regard to the impact of efficiency measures and rough estimates about the IT Plan costs and their allocation have the potential to overstate the cost estimates for the most popular services, such as registration. The Booz Allen Study also did not appear to consider “the timing of any adjustment in fees,”¹⁵ nor did there appear to be provisions in the study for adjusting fees within a time frame corresponding to the implementation of efficiency measures or the IT Plan, when actual experience with these measures may be observed.¹⁶

Nearly 85% of the revenue from fees comes from services, including registration services, which are considered elastic.¹⁷ The Copyright Office has correspondingly declined to seek recovery of 100% of costs by noting that “higher fees needed for total cost recovery would result in less use of those services to the detriment of the public interest in a robust registration system.”¹⁸ The study calculated the elasticity of demand over a 10% increase in price to be 3.2% for these services.¹⁹ The affected services include basic and most group registrations, many document recordation services, and other services. The Office has determined there will be a decline of 14% of demand among users of elastic services.²⁰ Based on 2016 volume, the proposed increases will impact over 79,000 users, the bulk of whom (over 67,000) are copyright owners who will be dissuaded from filing registrations due to the increased costs, as noted above.

With respect to the decrease in registration applicants, there are some indicators that this loss may actually be understated. In prior fee adjustment requests, the Copyright Office noted that even more modest increases have resulted in a loss of as many as 17% of filers.²¹ AIPLA is unaware, however, of the actual number of potential registrants lost in 2014 when the standard registration fees were raised to \$55. Nor does the Booz Allen Study indicate whether the attrition percentage recovers as owners adjust to the higher fees or if higher numbers of registrations in later years merely reflects the growing number of copyright claimants. The Copyright Office has noted that if it set a fee level to recover 70.4% of its costs, the Office would likely suffer a 25% reduction in the use of the Office’s services.²² AIPLA notes that the potential fee adjustment for the standard application seeks to recover 83% of costs. Additionally, this is the second significant increase in fees in the past five years. AIPLA is concerned that the timing and magnitude of fee escalation for this basic service may therefore

¹⁴ *Id.* at 23 (50% of the IT Modernization costs is listed at \$6,921,668 per year, a figure slightly above half of \$13,500,000 which is the midpoint of the estimated range).

¹⁵ 17 U.S.C. §708(b)(1).

¹⁶ U.S. Govt. Accountability Office (GAO): Federal User Fees, A Design Guide, May 2008 (<https://www.gao.gov/assets/210/203357.pdf>) (Reviews provide information on whether the fee rates and authorized activities are aligned with actual program costs and activities, may provide opportunities for stakeholder input, and can help promote understanding and acceptance of the fee).

¹⁷ Booz Allen Study at 8.

¹⁸ Fed. Reg. Vol. 83, No. 101, at 24056.

¹⁹ Booz Allen Study at 8.

²⁰ Fed. Reg. Vol. 83, No. 101, at 24057.

²¹ 2014 Analysis at 12 (the Office noted that in 2007 it experienced a 17% drop in registration filings when the fees were raised from \$30 to \$45).

²² Fed. Reg., Vol. 83, No. 101, at 24056.

have an even greater impact on users—not all of whom are commercial in nature²³—than the Office is anticipating.

Finally, AIPLA notes that, if the goal as articulated by the Copyright Office is to recover 60% of costs, then the standard application users and users of other high-volume services will be cross-subsidizing users of, for the most part, infrequently used services. But charging some users more than the cost needed to deliver their service, or charging a higher percentage of actual costs for delivering services to users whose demand is more elastic, may frustrate the goal of promoting accessibility to users.

Comments on Individual Categories of Fee Increases

1. Basic registrations

Basic registration applications are among the categories found by the Copyright Office and the Booz Allen Study to be elastic and, as such, the Office expressly considered the possibility that raising fees would discourage registration.²⁴ Still, it proposes increases of \$20 for electronic standard and single applications (an increase of 36% and 63%, respectively).

With these increases, the Office projects that it would achieve 83% cost recovery for standard applications. As noted above, the costs attributable to this service may be overstated and the increase, following a \$20 increase in 2014, may cause a greater reduction in filings than the Office anticipated. With regard to the single application, given that it was created to differentiate between “single authors and larger copyright owners,”²⁵ the proposed 63% increase in fees may have an even greater impact on smaller users. Using the elasticity estimates provided by the Booz Allen Study, the Office should expect a reduction of single applications by 18.2%. The increase in fees is nevertheless set to recover 64% of costs for single applications, which is close to the target recovery set by the Office. Unless the costs attributable to this service is overstated, the loss of applications may be unavoidable.

With regard to paper applications, the Copyright Office proposes to increase fees from \$85 to \$125, citing an interest in discouraging paper submissions. These fees therefore would exceed the Copyright Office’s costs of service, which funds could partially subsidize other activities. Although the Copyright Office explains why it would like to close its shortfalls and how it arrived at some of these figures, this dramatic increase may again run counter to the objectives of promoting registration and interaction with the Office. It seems likely that many of those who currently use paper applications despite the already higher cost do so because they lack the ability to utilize the electronic system. Significantly increasing paper costs may therefore be unduly punishing the economically disadvantaged, or least sophisticated applicants who are unable to file digitally.

2. Group registrations

Group registrations are the second highest volume service the Copyright Office provides and are expensive to process.²⁶ The Office asserts that its proposed fees for this category are “fair

²³ AIPLA recognizes that the single application was created to address small stake holders, but it is not available to all individuals nor can it be used by small businesses.

²⁴ Fed. Reg., Vol. 83, No. 101, at 24057.

²⁵ 2014 Analysis at 1.

²⁶ Fed. Reg., Vol. 83, No. 101, at 24058.

and equitable, and give due consideration to the objectives of the copyright system,” levying some of the largest fee increases here “due to the relative inelasticity of the demand for these services.”²⁷

Under the Office’s proposal, standard group registrations of contributions to periodicals will remain \$85, with corresponding costs of \$71, the excess of which can be used to offset other costs. Group registration of newspapers and newsletters would go from \$80 to \$95 (electronic filing) or \$125 (paper filing).

A new fee of \$100 would be levied for unpublished photographs and published photographs would increase from \$55 to \$100, each with corresponding costs of \$284. The Office explains these increases by noting the low per-work cost if the applicant registers the maximum number of photographs, but that rationale is weakened for those who may want to register fewer than the maximum and face a nearly-doubled fee.

Group registration of updates and revisions to photographic and non-photographic databases have even larger proposed fee increases, from \$55 (electronic) and \$65 (paper) to \$250, and from \$85 to \$500, a whopping increase of 488%. Although costs to process these registrations are high (e.g., \$694 for non-photographic), it may be important to determine the most likely users of these services. Commercial users presumably will be able to adjust, whereas individual photographers may be more discouraged to file for registration of their works.

Finally, the Copyright Office proposes new fees, including for group registration of secure test items, for which they propose charging \$75 with a corresponding cost of \$883. It is unclear, however, why the Office proposes to charge these presumably commercial users such a relatively small percentage of their costs.

3. Other registration services

Other registration services are used less frequently than basic and group registrations, but some are extremely time consuming and costly to the Copyright Office. The fee for registration of vessel designs is proposed to increase from \$400 to \$500, but the estimated cost of the service is \$6,528.²⁸ There were no such registrations in 2017, and this may be an area where fees could be more proportionate to the actual costs.²⁹

Likewise, the fee for registration of a mask work (of which there were only 27 in 2017) would increase from \$120 to \$150, but costs the Office \$2,176. Again, although the low volume makes the overall impact of any increase fairly insignificant, the rationale for why these users should pay such a small percentage of their costs has not been articulated.

The “special handling surcharge for registration” is another area with notably unbalanced fees and costs. The Office intends to increase its fees for expedited processing of an application from \$800 to \$1000, while that service costs only \$67. Given the amount of time normal processing can take—which may be improved through the IT Plan’s implementation—and the looming question before the Supreme Court in *Fourth Estate Public Benefit Corp. v. Wall-Street.com* (Dkt. No. 17-571) regarding whether a decision by the Office on a registration

²⁷ *Id.*

²⁸ *Id.* at 24059.

²⁹ Copyright Office Annual Report 2017, at 18, available at <https://www.copyright.gov/reports/annual/2017/ar2017.pdf>.

application is required before filing suit, this proposed increase seems unnecessary or perhaps should be tabled by the Office pending the Supreme Court’s decision.

Several other services in this category have less marked discrepancies between cost of service and current and proposed fees, but proposed fees still appear somewhat arbitrary. The Office remarked regarding the vessel hull design and mask work registration that it would “examine its processes to determine how to more efficiently process them.”³⁰ It seems that more study of the proposed increases and current estimated costs may be worthwhile not only for these works, but more broadly for these less frequently used services.

4. Recordation and related services

The Copyright Office proposes raising the basic paper recordation fee from \$105 to \$125, with a new electronic alternative fee of \$95. With estimated costs of \$155 and \$131, these services would recover 81% and 73% of costs, respectively.³¹ Further, the estimated loss of filers is only 6.4% which, while regrettable, may be unavoidable. In December 2017, the Office adopted a reduced fee structure for electronic submissions for additional titles and it currently proposes no changes to those fees at this time.³² This relief for extra titles may have some offsetting savings in overall fees that lessens the impact on users of these services. The Office does request an increase from \$550 to \$700 for special handling, however, which costs the Office only \$92.

5. Record retrieval, search, and certification services

Although location and retrieval of records can be time consuming and costly for the Office, it proposes very few fee increases in this category, which consists of services that vary greatly in complexity. To provide a clear fee structure to the public, it uses mostly hourly fees, and only increases the fee for the provision of an additional certificate of registration (from \$40 to \$50, with an estimated cost of \$285). The Office may wish to reconsider its position on this category of services.

6. Miscellaneous fees

The Copyright Office’s proposals for the miscellaneous fees are largely unchanged, other than those associated with dishonored checks and uncollectable payment (both of which are increased to roughly cover costs). This is a potential area for further increased fees to deter such behavior.

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³⁰ Fed. Reg., Vol. 83, No. 101, at 24060.

³¹ *Id.* at 24061.

³² *Id.*

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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 black ink that reads "Myra H. McCormack". The signature is written in a cursive, flowing style.

Myra H. McCormack

President

American Intellectual Property Law Association