

January 24, 2022

The Honorable Shira Perlmutter  
Register of Copyrights and Director  
U.S. Copyright Office  
101 Independence Avenue, SE  
Washington, DC 20559-6000

**Re: Comments Submitted Pursuant to Notice of Inquiry: Deferred  
Registration Examination Study, 86. Fed Reg. 70540 (December 10,  
2021)**

Dear Register Perlmutter:

The American Intellectual Property Law Association (AIPLA) is pleased to offer comments in response to the above-referenced U.S. Copyright Office Notice of Inquiry related to deferred registration examination.

Founded in 1897, AIPLA is a national bar association of approximately 8,500 members who are engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent (utility and design), trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping to establish and maintain fair and effective laws and policies that stimulate and reward invention but that also balance the public's interest in healthy competition, reasonable costs, and basic fairness. Our members have a key interest in an efficient and effective Copyright Office.

AIPLA recognizes that, under the current system, many creators—not only smaller creators, but also rightsholders owning large numbers of works, or works that are iterative in nature—are deterred from registering their copyrights due to cost. AIPLA believes that the Office should address these issues with a comprehensive solution not confined to minor variations in existing registration forms, processes, and systems. We commend Senator Tillis and the Office for undertaking this study to explore an alternative to the current structure.

AIPLA offers the following responses and comments to certain of the questions and issues raised by the Office in the Notice.

**1. What specific perceived deficiencies in the current registration regime could a deferred examination option address?**

The perceived deficiencies of the current system are the costs of registering multiple works, the extent to which group registration taxes the Office's resources, and the economic bias favoring claiming unpublished status in order to avail oneself of less expensive registration options. This can result in applicants making strained or inaccurate claims of unpublished status, which results in an inaccurate database for the Office, and can have devastating divestive consequences for the applicant. This is particularly unfair to individual applicants who may claim in good faith that their work is "unpublished" as that term is colloquially understood and used in the industry.

**2. What are the potential benefits and drawbacks to offering a deferred examination option? Responses should consider the positive and negative effects on both copyright owners and users, as well as on the registration system itself, and should include any empirical data or other evidence relevant to your assertions. Responses should also consider whether, or to what extent, a deferred examination option might either further or impede the purposes of registration.**

A deferred examination system that makes it less expensive to register multiple works would encourage filings, improve application completeness and accuracy, reduce errors, and reduce unnecessary side disputes in enforcement and litigation. Further, deferred examination may be less taxing to the Office's resources by eliminating the need to examine every application upon arrival, and could also reduce or eliminate issues in small claims matters adjudicated by the Office in CASE Act tribunals.

One drawback would be that many applicants who would have otherwise completed the registration process will elect not to in order to save costs and potentially, which could result in a less complete public record unless these deferred examination applications are indexed and viewable by the public. Another potential drawback and serious concern is the potential for abuse. Specifically, an applicant may elect deferred examination and then seek to enforce claims that arguably extend beyond the scope of the application or for a work that may not be copyrightable. We offer suggestions to address these points in response to other questions.

**3. If you are advocating for a deferred examination option, describe the specific legal or regulatory framework you envision. Would any statutory amendments be necessary?**

Ideally, we envision the option for deferred examination being one component of a completely revamped "wizard" system for filing applications that replaces the current forms.

AIPLA has previously proposed, and continues to support, the development of a new application system that enables users to register various works in a single session regardless of whether these might historically be considered as part of a group, or unpublished and published, at the time of registration. The current system, which offers more flexible group filing options for certain categories of works (e.g., photographs) as well as for unpublished works or single units of publication, incentivizes applicants to shoehorn works into these categories regardless of whether they may qualify. This creates the potential for unwelcome litigation as to whether a given work was properly registered. AIPLA's proposed regime

would place rightsholders in all works on an even playing field. Moreover, a registration regime that does not discriminate based on publication status would simplify the registration system and eliminate unnecessary incentives to avoid publication or assert unpublished status.

The proposed system would eliminate the current forms and group registration options entirely. Instead, a user would identify the works intended for registration, input various data about them (including claims of publication), upload deposit copies, and the system would then assess fees according to the types of works and volume—and whether deferred examination was requested for some or all of the works. Offering a deferred examination option as a component of this type of system would potentially make volume discounting economically workable for both the Office and for applicants by significantly reducing the burden inherent in substantive review.

**4. Should a deferred examination option have any work-based, applicant- based, or other eligibility restrictions? For example, should the availability of the option depend on whether the work belongs to a specific class of works (e.g., photographs), is published or unpublished, and/or is deposited in physical or electronic form?**

No. The system AIPLA envisions would not distinguish between classes of works, absent a compelling statutory or commercial reason to do so. The publication status of a work (for registration purposes) is often difficult to determine with certainty. This presents the risk that applicants provide, in good faith, an incorrect publication status. Because this error is generally found during enforcement, the current system, which conditions certain group registration options on publication status, has inadvertently created a “gotcha” situation in litigation. AIPLA advocates against using publication status to qualify for deferred examination.

**5. How should deferred examination operate in connection with an application to register multiple works?**

AIPLA’s proposed system would weigh both the total number of works sharing various criteria and whether deferred examination is being requested to arrive at a cost for any given filing session.

**6. How should the filing fees be determined for a deferred examination option, including both for the initial submission and later examination, and how should they compare with fees where examination is not deferred?**

To meaningfully increase filings, the initial filing fee would need to be substantially less. The overall costs for an application that is prosecuted through a determination as to registrability, however, would be equal to or greater than a typical non-deferred application.

**7. Should applications for deferred examination undergo any kind of initial review (e.g., to verify the accuracy of the filing fee, that the application is complete, that the deposit is in the correct form, etc.)?**

No. AIPLA believes that this would defeat the purpose, place an undue burden on the Office, and likely resulting in higher initial filing fees.

**8. Who should be permitted to request examination of a deferred examination application package? For example, should such a request be limited to an author or copyright owner, or should other interested parties also be permitted to request examination?**

AIPLA believes that any party with a good faith basis should have the right to compel a deferred examination applicant to seek review. At that point, the applicant would either need to pay to proceed with examination or forfeit the application. While the exact parameters of a good faith basis require further study and consideration, we envision this option being open to accused infringers, actual or potential licensees, and actual or potential acquirers of, or other successors-in-interest to, the copyright in question, actual or potential lienholders for whom the copyright may constitute a security interest, and the like.

**9. Should there be a time limit for requesting examination (e.g., one year)? If so, what should be the ramifications of failing to request examination within the prescribed period? Responses should consider the implications for the Office's administration of the registration system, including the retention and storage of deposits and other application materials, as well as the governing principles that should apply to an eventual examination.**

AIPLA believes that there should be a time limit, and if no party has requested examination before the time limit expires, the applicant must pay an additional fee to renew the application and extend the time limit. This fee should be calculated to account for the administrative burden and costs of maintaining the application. The time frame should be relatively long to avoid overburdening applicants with the cost and hassle of frequent managing renewal filings. AIPLA proposes for initial consideration a time frame of 5 years.

**10. How, if at all, should a deferred examination option account for any changes in the required application information that occur between submission and examination (e.g., a change in ownership or publication status)?**

The examination process should include an opportunity and/or requirement for applicants to update the application if and as necessary prior to substantive examination.<sup>1</sup> If any changes are made, the Office might consider assessing a fee. This opportunity is also important in situations where examination is requested by a third party (if permitted).

**11. How, if at all, should any deficiencies in the application materials discovered during examination be addressed with respect to the EDR and the current requirements of section 410?**

We believe the process currently utilized by the Office to notify and remediate any such deficiencies with the applicant and/or its representation may be utilized in deferred examination as well. In general, if the deficiencies in question are technical or procedural in

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<sup>1</sup> AIPLA understands this provision as contemplating updates to the application only, rather than the initial deposited work, which should remain unchanged from the original submission.

nature, and not indicative of substantive deficiency (such as an incomplete deposit) or an intent to deceive or mislead, once the applicant has remediated or addressed such deficiencies, registration should proceed under Section 410(a), and the effective registration date should be the initial filing date. Alternatively, this could be treated in the same manner as supplementary registrations. In that case, the Office leaves it to the courts to decide whether the changes made by a corrective filing are material such that the date the that later filing date should control, or whether the date of the original filing is the effective date.

**12. How, if at all, would a deferred examination option affect the public records maintained by the Office? For example, should information about a work submitted for registration using a deferred examination option be indexed into the public catalog prior to the claim being examined and registered? What are the potential benefits and drawbacks to such an approach? For example, how, if at all, may it affect the integrity and reliability of the public record?**

If the system permits deferred applications to remain pending for significant amounts of time, public transparency is important, particularly if third parties have an opportunity to request examination. Deferred examination applications should be indexed and easily searchable to at least the minimal degree necessary for the public to confirm the existence of, and access basic bibliographic information about, such applications.

**13. How, if at all, might a deferred examination option affect the ability of the Library of Congress to maintain and grow its collections? For example, should a work submitted for registration using a deferred examination option when the claim has not yet been examined and registered be eligible for selection for the Library's collections? What are the potential benefits and drawbacks to such an approach?**

AIPLA has no opinion on this matter and defers to the Office and the Library on the proper management of its collections.

**14. How, if at all, might a deferred examination option affect the ability to bring suit in light of the Supreme Court's decision in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*? For example, should a later request for examination be sufficient to bring suit? What are the potential benefits and drawbacks to such an approach?**

Registration should still be required for suit. Applicants should be entitled to seek expedited review of their deferred examination applications where litigation is anticipated, as under the current system.

**15. Could a deferred examination option be used for improper purposes, such as to obtain an official record for material that is non-copyrightable in an effort to harass or defraud others? If so, how might such abuses be prevented?**

Yes, public education as to the significance of a pending application as opposed to a registration would be advisable.

As discussed earlier, it will be important that third parties—including but not limited to those accused of infringement—have the right to compel the applicant to seek examination. This will give accused infringers who believe that the applicant’s claim is meritless recourse. Either the applicant will pay to proceed within a set, short time-frame, or they will forfeit the application.

**16. How, if at all, might a deferred examination option affect enforcement of a copyright by the U.S. Customs and Border Protection?**

We believe that no changes are needed with respect to U.S. Customs and Border Protection.

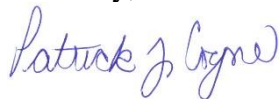
**17. Could the same goals that a deferred examination option is meant to achieve be accomplished through alternative means, such as by amending the preregistration regime or the eligibility for statutory damages, or by reducing filing fees or adding new or expanded group registration options? Responses should discuss the potential benefits and drawbacks of any alternatives and why they may or may not be preferable.**

Yes. While AIPLA’s proposed “wizard” system would be particularly effective coupled with deferred examination, we believe that even without a deferred examination option, this system could offer a more equitable and cost-effective way to register multiple works at once.

AIPLA would also support 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 United States Patent and Trademark Office (“USPTO”), which distinguishes between different types of applicants on the basis of enterprise size for purposes of assessing fees for patent applications.

AIPLA appreciates the opportunity to provide these comments and would be happy to answer questions they may raise.

Sincerely,



Patrick J. Coyne

President

American Intellectual Property Law Association