
THE BENEFITS OF REGISTRATION

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I. INTRODUCTION

Imagine the initiation of a copyright infringement action involving a published novel. The plaintiff has claimed to the court that an application to register the copyright for the novel was submitted to the U.S. Copyright Office on February 4, 2019, and initiated suit on February 7. Her complaint alleges that the defendant unlawfully infringed the work on December 15, 2018. Her application to register the copyright for the novel states that it was published on November 19, 2018. At this point in the proceedings, the district court judge and the defendant might assume they are dealing with a lawfully registered copyright. However, what neither the court nor the defendant could possibly know was that the plaintiff's application, although it was in fact received by the Office on February 4, 2019, was accompanied by a personal check for the registration fee that was uncollectible, and the required deposit copy of the novel was not received by the Office until February 21, 2019. Further, once it arrived, a Copyright Office Examiner determines that the flash drive the plaintiff submitted as a deposit copy of her work was not the required best edition and that the deposited work included a second author's name and a November 19, 2017, publication date; facts wholly inconsistent with the publication and authorship information given on the application. The Examiner also discovers that the work includes previously published material that was not identified in the application as required by the Copyright Act.¹ As it stands, has the applicant met the minimum requirements for establishing an effective date of registration?² What action, if any, should the court take in a lawsuit based on this application?

Fortunately, this scenario could not occur after the Supreme Court's unanimous decision in the *Fourth Estate Publishing Benefit Corp. v. Wall-*

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¹ 17 U.S.C. § 409(9).

² An effective date for this registration cannot be established until the Office examines the application and deposit copy, and then corresponds with the applicant to request that the applicant correct the deficiencies. *See* 17 U.S.C. § 410(d).

Street.com, LLC case.³ But it occurred countless times before that decision, which struck down the so-called “Application Rule.” The consequences of moving forward with the above-described infringement action without the benefit of the Office’s effort to clarify or correct inconsistencies, omissions, or defects in the application would have been significant. Without knowing whether the Office received the fee and the deposit “in proper form,”⁴ it would be impossible for the court and the defendant to know whether statutory damages or attorney’s fees would be available to the plaintiff. In the scenario above, neither remedy would be available because the effective date of registration⁵ would be later than both the date of infringement and three months⁶ from the date of publication. Depending on what part of the work had been alleged to have been infringed, from the facts provided, it might also be unclear whether the registration extended to certain preexisting works contained within the claimed work, if in fact a certificate of registration every issued.

Many in the copyright community are aware of the statutory benefits of copyright registration with the U.S. Copyright Office. While registration is not necessary to obtain federal copyright protection, Congress provided a number of incentives to register copyright claims in a timely fashion including, registration as a prerequisite to initiating a copyright infringement suit in federal court, timely registration as a prerequisite to the availability of statutory damages and attorney’s fees, and registration as a *prima facie* evidentiary presumption of validity of the copyright and the facts stated in the certificate. However, what often goes unnoticed are

³ *Fourth Estate Publ’g Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

⁴ 17 U.S.C. § 411(a) (“In any case, however, where the deposit, application and fee required for registration have been delivered to the Copyright Office *in proper form . . .*”) (emphasis added).

⁵ See 17 U.S.C. § 412, § 411(a), § 410(d) (“The effective date of copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration have all been received in the Copyright Office.”); see also, H.R. REP. NO. 94-1476, at 157 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5774 (“Where the three necessary elements are received at different times the date of receipt of the last of them is controlling, regardless of when the Copyright Office acts on the claim. The provision not only takes account of the inevitable time-lag between receipt of the application and other material and the issuance of the certificate, but it also recognizes the possibility that a court might later find the Register wrong in refusing registration.”).

⁶ Generally speaking, a plaintiff may recover attorney’s fees and statutory damages for infringement occurring after the effective date of registration. 17 U.S.C. § 412. There is a limited exception for pre-registration infringement of published works if infringement occurs within the first three months after publication, AND registration for the work is made within three months. *Id.*

the more nuanced benefits that the registration process provides to both applicants, potential defendants, and the courts. Indeed, few realize that the examination process is not limited to an examiner's determination of copyrightability in the work claimed for registration.

This article discusses some of the concrete ways in which the copyright registration system and examination process provide significant benefits to applicants and the court system. By revealing the range of issues that examiners are confronted with on a daily basis, the value of registration as an intermediary filter for applicants and the courts becomes apparent. Examiners perform a significant amount of remediation with copyright applications to establish a more accurate public record, attempt to resolve deficiencies, flag potential concerns, and clarify the scope of the claim. Finally, the article will discuss how current efforts to modernize the Copyright Office can further increase these benefits to the courts and the public.

II. THE ROLE OF EXAMINERS IN ASSISTING COURTS

A. The Known Benefits

Under the current copyright law, original works of authorship are protected from the moment they are created and fixed in a tangible medium of expression.⁷ Works are protected by copyright regardless of their registration status.⁸ Still, copyright registration remains important for many reasons, including that it is a prerequisite for filing an infringement action for U.S. works.⁹ Indeed, copyright registration has been a fundamental part of the copyright system in the United States since the nation's beginnings.¹⁰ Although copyright registration as a condition for copyright

⁷ 17 U.S.C. § 102(a).

⁸ “[T]he Copyright Act safeguards copyright owners, irrespective of registration, by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point forward.” *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881, 892 (2019).

⁹ Registration (or a refusal to register) is a prerequisite to filing a lawsuit for copyright infringement involving a U.S. work. *See* 17 U.S.C. § 411(a); *see also* *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 132 S. Ct. 1962, 1977 (2014) (“Although registration is ‘permissive,’ both the certificate and the original work must be on file with the Copyright Office before a copyright owner can sue for infringement.”); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 678 (9th Cir. 2014) (“Though an owner has property rights without registration, he needs to register the copyright to sue for infringement.”); UNITED STATES COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 202 (3d ed 2017) [hereinafter *THIRD*].

¹⁰ Zvi S. Rosen and Richard Schwinn, *An Empirical Study of 225 Years of Copyright Registrations*, 94 *TULANE L. REV.* 1003, 1008 (2020). “The United States of America is unique for having a procedure for the registration of copyrights for essentially its entire existence. . . . Registration of copyrights began with passage of

protection has gradually been eliminated over the past two centuries,¹¹ the importance of registration and the benefits it bestows has increased.

The statutory incentives for timely registration are relatively well-known. They include:

- Registration as a prerequisite to an infringement action for U.S. Works;¹²
- Registration as a prerequisite to statutory damages and attorney's fees;¹³
- Registration constitutes *prima facie* evidence of copyright validity;¹⁴
- Registration needed for constructive notice of recordation;¹⁵
- Registration needed to counter defense of innocent infringer where copyright notice is omitted;¹⁶ and
- Registration needed for certain customs remedies.¹⁷

the Copyright Act of 1790, but there were registrations under various state acts before that as well. G. Thomas Tanselle, *Copyright Records and the Bibliographer*, 22 *STUD. BIBLIOGRAPHY* 77, 81-83 (1969).” “From the inception of our first federal copyright act in 1790, registration as an unwaivable prerequisite to copyright has remained, a longevity that cannot be rivaled by few, if any other, statutory provisions.” WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 17:77 (2020).

¹¹ BENJAMIN KAPLAN, *STUDY NO. 17: THE REGISTRATION OF COPYRIGHT*, in *STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES NOS. 17-19* (Comm. Print 1960) (surveying the development of copyright formalities, 1790-1905); ROBERT WEDGEWORTH & BARBARA RINGER, *REPORT OF THE CO-CHAIRS, THE LIBRARY OF CONG. ADVISORY COMM. ON COPYRIGHT REGISTRATION AND DEPOSIT* 15-17 (1993); see also Patry, *supra* note 9, § 6.3; 2 MELVILLE B. MILLER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 7.16 (2019).

¹² 17 U.S.C. § 411(a) (“[N]o civil action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made” with the Copyright Office.).

¹³ *Id.* § 412. In order for a copyright owner to be entitled to recover statutory damages and attorney’s fees, the work must have been registered prior to commencement of the infringement for which such remedies are sought (or within three months after the first publication of the work).

¹⁴ Per 17 U.S.C. § 410(c), the copyright registration certificate constitutes *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate if registration is made before or within five years of publication.

¹⁵ 17 U.S.C. § 205(c)(2). Under certain circumstances, recordation of a transfer of copyright, or of other documents relating to a copyright in a work, constitutes constructive notice to all persons of the facts stated in the recorded document. One of the conditions to such constructive notice is that the work to which the document pertains be registered.

¹⁶ Registration may be significant in determining whether an innocent infringer has either a complete defense or a defense as to statutory damages and attorney’s fees.

¹⁷ To record a copyright with the United States Customs Service, an “additional certificate” from the Copyright Office must be filed with the Customs Service. 19 C.F.R. § 133.33(a)(1). Upon recordation, Customs will bar the importation of ille-

But the examination process as specified in §§ 409, 410, and 411 requires scrutiny of the materials submitted. Did the application and deposit meet all of “the legal and formal requirements of title 17?”¹⁸ Were the deposit, application, and fee required for registration delivered to the Copyright Office in “proper form?”¹⁹

The answer to these questions will depend on many facts and variations that can raise a multitude of additional questions. It is also important to recognize that meeting the legal and formal requirements of title 17 often includes satisfying the Copyright Office’s regulatory requirements established under the authority granted to the Register of Copyrights by title 17.²⁰ There are, therefore, additional regulatory requirements for registration that may be applicable based on the particular type of work being submitted (e.g., deposit requirements) or the type of application used.²¹ These regulatory requirements are promulgated by the Office, in accordance with the Administrative Procedure Act rulemaking processes.²² Because Copyright Office regulations result from an explicit delegation of rule-making authority to the Register of Copyrights by Congress,²³ they have the force and effect of law.²⁴

The statute also explicitly provides for consultation with the Office regarding registration when there is a question involving a knowing misstatement of material facts in an application for registration.²⁵ Section 411(b) reinforces Congress’s intentional decision to provide the courts

gal copies of the registered work. *Id.* § 133.42. Similarly, copyright registration is required for securing relief from the International Trade Commission. 19 U.S.C. § 1337(a)(1)(B)(i).

¹⁸ See 17 U.S.C. § 410(a).

¹⁹ See *id.* § 411(a).

²⁰ See *id.* § 408(c).

²¹ As just one example, consider the *ten* separate eligibility requirements for the group registration of unpublished works provided by 37 C.F.R. § 202.4(c)(1-10). There are also strict regulatory requirements for registration of particular types of works such as computer programs (37 C.F.R. § 202.20(c)(2)(vii)), motion pictures (37 C.F.R. § 202.20(c)(2)(ii)), and works reproduced in three-dimensional objects (37 C.F.R. § 202.20(c)(2)(xi), to name a few.

²² See 5 U.S.C. § 553; 17 U.S.C. § 701(e).

²³ 17 U.S.C. § 702.

²⁴ See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (holding that “[w]hen Congress has ‘explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,’ and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.” (quoting *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984))).

²⁵ See 17 U.S.C. § 411(b)(2). The Prioritizing Resources and Organization for Intellectual Property Act of 2008 amended the title for section 411 by inserting “civil,” so that the new title is “Registration and civil infringement actions.” Pub. L. No. 110-403, 122 Stat. 4256, 4257. It also amended subsection (a) to insert

with the benefit from the Register of Copyrights' judgment with respect to the validity of a registration—a prerequisite to a copyright infringement action for U.S. works.

It is also important to note the difference between *substantive* and *procedural* refusals. Substantive refusals occur when works are not original, or are not within the scope of title 17, as outlined by section 102. Procedural refusals occur when an applicant fails to meet the statutory and regulatory requirements for registration including specific eligibility requirements for particular group registration options, or when either the applicable fee or deposit requirements are not met. Section 411(a) allows a party to initiate a copyright infringement action for a U.S. work following a refusal by the Office, but only “where the deposit, application, and fee required for registration have been delivered to the Copyright Office *in proper form*. . .” (emphasis added). There is no question that an applicant can forego an administrative request for reconsideration of a refusal within the Office and instead initiate an infringement action with a refusal based on a determination that the work lacks sufficient creativity.²⁶ However, an applicant may not initiate a civil action for infringement of copyright if the deposit, application, or fee was not delivered to the Office in “proper form.” For example, an infringement action could not be initiated based on the refusal of a submission of multiple works for which there was no applicable group registration option, the submission of an improper deposit, or the failure to pay the required fee. These distinctions are not always readily apparent to courts without information from the Office.

B. The Work of the Registration Program of the United States Copyright Office

The most obvious function of the registration examination process is the assessment of originality and whether the work claimed contains a sufficient amount of creative authorship to sustain a claim in copyright. The copyright examination process does not entail independent research or a comparison to prior works, but rather whether the work meets the relatively low threshold for copyrightability. The examination process also generally takes the facts stated on the application at face value and does not verify the truth of those statements. For example, an examiner generally will not question the authorship or ownership claims in a work unless there is some inconsistency between the facts stated in the application and the deposit. Similarly, an examiner will generally not question the em-

“civil” before “action” in the first and second sentences. *Id.* It re-designated subsection (b) as subsection (c) and added a new subsection (b). *Id.* at 4257–58.

²⁶ Assuming that the other requirements of § 411(a) have been met, including the service of notice on the Register of Copyrights of the action together with a copy of the complaint and compliance with the Federal Rules of Civil Procedure.

ployment status of an author or whether the author was authorized to claim a work. Approximately 75% of applications submitted are now registered without any intervention or correspondence from the Office.

Because the Office accepts many facts stated in an application for registration at face value without investigation or verification, if a registration is involved in litigation, there are many assertions in registered claims that may be challenged in court. Section 410(c) provides a presumption of the validity of the copyright and the facts stated in the certificate, but that presumption is rebuttable. For instance, while the claimant in an application for registration may assert a transfer of ownership of the work from the author, a court may have to determine whether there was in fact a legally valid signed, written agreement that transferred all of the author's exclusive rights to the claimant. The registration examination process assists applicants and the courts by identifying and addressing inconsistencies prior to the issuance of a certificate but the validity of many of the assertions in an application are left to the courts. Similarly, issues identified by examiners in certain claims may not necessarily be relevant to, or adopted by, courts if the work(s) becomes involved in litigation.

Given the scale, scope, and breadth of copyright registrations, the intermediary role of the registration process provides an important function. The three Divisions of the Registration Program receive approximately 500,000 claims every year²⁷ to be handled by approximately 125 examiners.²⁸ With the availability of group registration options under the 1976 Copyright Act, these claims can involve the examination of several million

²⁷ The annual number of registration certificates issued since 1870 is available in the Appendices of the Copyright Office's Annual Reports. For annual report for 2019, see UNITED STATES COPYRIGHT OFFICE, ANNUAL REPORT: FISCAL 2019 (2019), <https://www.copyright.gov/reports/annual/2019/ar2019.pdf>. The number of applications received by the Office is greater than the number registered each year, particularly during years when the Registration Program maintained a backlog of unresolved works, but no historical data is currently available for the number of registration applications received each year or the number of works cumulatively included in such applications.

²⁸ As a result of sequestration and budget cuts between 2010 and 2015, the number of examiners had been reduced by almost 40%, from 125 examiners in 2010 to approximately seventy-five in 2015. Beginning in 2015, the Office gradually began increasing the number of examiners and backfilling retirements to eliminate the backlog and decrease processing times for resolving claims. Both goals have been achieved and the number of examiners has gradually returned to 2010 levels. With 500,000 claims per year, 125 examiners would have to resolve approximately four registration applications every hour of every working day. This includes corresponding with approximately 25% of applicants to resolve questions or deficiencies in the application or deposit. The fee is handled by the Accounts Section of the Office of the Chief Financial Officer.

works every year.²⁹ Moreover, unlike federal judges that may see one or a few copyright cases a year, U.S. Copyright Office examiners collectively may see thousands of applications every day. In fact, examiners may examine more works for registration each day, in their limitless variations, than the federal courts see in a year. Resolving the above questions on a regular basis provides the Office with a unique perspective on facts and subject matter that can be extremely valuable to the judicial system. Judges, litigants, and lawful users of copyrighted works will never be in a position to evaluate the scale and scope of issues reviewed by Copyright Office examiners.

Because each of the three Divisions — the Literary Division, the Performing Arts Division, and the Visual Arts Division — review distinct subject matter claims, the examiners, supervisors, and managers within each Division gain significant experience and knowledge of copyright law and practices related to that particular subject matter. Each Division's examiners also review an unimaginable spectrum of factual variations, both with respect to the works themselves and in the facts stated within the application. The work of examiners can be the equivalent of taking a dozen law school copyright exams every day, and this continues over the course of their careers often spanning several decades. An examiner's knowledge and experience is not infallible but it is incredibly useful in spotting problems and inconsistencies that can be addressed prior to issuing a certificate and prior to a court's possible review of the claim.

Examiners are committed to creating an accurate public record. They often must try to understand what the applicant is trying to achieve by communicating with the applicant to remedy inconsistencies or errors within the application. Intuiting the applicant's objective, seeking confirmation or clarification, and trying to explain the options available to the applicant can be extremely difficult. Many applicants do not understand copyright law, Copyright Office practices, terms of art, or the eligibility requirements for various application options. Explaining relevant considerations while abstaining from providing legal advice is an extremely difficult line to draw.³⁰ This is not to say that the navigating the registration system and obtaining a registration is difficult. A majority of applicants both navigate the application process easily and obtain registration certificates promptly. The Office also provides a great deal of assistance through the Office's website, online documents, videos, FAQs, and through the Public Information Office of the Office of Information and

²⁹ 17 U.S.C. § 408(c)(1) authorized the Register of Copyrights to promulgate regulations that allow a single registration for a group of related works.

³⁰ The daunting task of providing general copyright information to the public is managed by the Public Information Office, a division of the Office of Public Information and Education.

Education. Yet, with a correspondence rate of approximately 25%, a significant number of issues in applications are regularly identified prior to the creation of the public record and possible review by a court.

Courts need not defer to the Office's expertise in every — or in any — case. The statute anticipates that courts may disagree with the Office in a particular infringement action.³¹ Indeed, the 1976 Copyright Act intentionally altered prior law to allow infringement actions to be initiated in the federal courts based on registrations refused by the Office.³² And in many infringement actions, the questions before the court are different from the determinations made by the Office.³³ The examiners' assessments are made in a non-adversarial context that are divorced from disputes between competing parties.

Congress expected and intended the courts to benefit from the Copyright Office's expertise. According to Congress, the registration requirement was intended to streamline copyright infringement litigation and keep marginal claims out of court.³⁴ The Register of Copyrights has been quoted as stating that “the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law.”³⁵ The Department of Justice has recognized that one of the reasons

³¹ See 17 U.S.C. § 411(a), § 410(d). An applicant may initiate an infringement action based on a refusal to register if the deposit, application, and fee were received by the Office in proper form and subject to the conditions specified in § 411(a) and the Federal Rules of Civil Procedure as to the registrability of the work at issue. If a court finds a refused work to be registrable, the court may apply the effective date of registration to determine whether the claim was entitled to statutory damages and/or attorney's fees pursuant to § 410(d). However, that determination only applies to the specific infringement action before the court. A court may not order the Register of Copyrights to either register a work, see *Pro-line Concrete Tools, Inc. v. Dennis*, No. 07cv2310-LAB (AJB), 2013 U.S. Dist. LEXIS 188384, at *6-7 (S.D. Cal. Mar. 28, 2013) or cancel a registration, see *Brownstein v. Lindsay*, 742 F.3d 55, 75 (3d Cir. 2014) (“Courts have no authority to cancel copyright registrations because that authority resides exclusively with the Copyright Office.”).

³² H.R. REP. NO. 94-1476, at 157 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

³³ The Office determines whether the application for a claim in an original work of authorship is copyrightable, is in proper form, and meets the legal and formal requirements of Title 17 and the relevant Copyright Office regulations. On the other hand, in infringement actions (that predominantly involve infringement of the reproduction right), courts are typically asked to determine whether the defendant improperly appropriated copyrightable elements of the copyrighted work. Most infringement claims do not involve infringing reproduction of the entire work but rather reproduction of portions of the registered work.

³⁴ See H.R. REP. NO. 100-609, at 41-42 (1988) (registration “promotes efficient litigation practices” by discouraging frivolous claims).

³⁵ STAFF OF H.R. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTRAR OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 75 (Comm. Print 1961).

for the registration requirement is to “afford courts the benefit of the Copyright Office’s expertise.”³⁶ Similarly, courts themselves have stated the importance of Office determinations³⁷ and Office publications.³⁸

The Registration Program examines claims from an extremely wide range of applicants whose knowledge and understanding of copyright law, U.S. Copyright Office regulations, practices, and the choice of applications may vary widely. There are many experienced applicants that submit applications on a regular basis, including attorneys, industry representatives, publishers, companies, and creators. However, there are also many cre-

³⁶ Brief for the United States as Amicus Curiae, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (No. 08-103), 2009 WL 1601031.

³⁷ See, e.g., *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041–42 (9th Cir. 2014) (agreeing with the Copyright Office’s assessment that the shape of a hookah was not registrable, noting that “[w]e credit this expert opinion of the Copyright Office—the office charged with administration and enforcement of the copyright laws and registration”; *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286 n.5 (3d Cir.2004) (en banc) (Alito, J.) (quoting *Skidmore v. Swift & Co.*, 323 U.S. at 139-140 (1944)) (The Copyright Office’s well-reasoned position “reflects a ‘body of experience and informed judgment to which courts and litigants may properly resort for guidance.’”); see also *Kay Berry v. Taylor Gifts, Inc.*, 421 F.3d 199, 205 (3d Cir. 2005) (“Here, the Copyright Office’s interpretation of the ‘single work’ regulation in light of its own practices is particularly compelling given that the regulation here in issue was promulgated to ‘codif[y] the pre-existing Copyright Office practice of allowing copyright owners to register multiple works published together as a single work for a single fee.’” (citing 43 Fed. Reg. 965, 966 (Jan. 5, 1978) (codified at 37 C.F.R. pt. 202)); *McLaren v. Chico’s FAS, Inc.*, No. 10 CIV. 2481 JSR, 2010 WL 4615772, at *3 (S.D.N.Y. Nov. 9, 2010); see also *New York Mercantile Exch., Inc. v. Intercontinental Exchange, Inc.*, 389 F. Supp. 2d 527, 543 (S.D. N.Y. 2005), *aff’d*, 497 F.3d 109 (2d Cir. 2007) (“The Copyright Office’s long-standing practice is to deny Copyright protection to words and short phrases, and courts have found that the policies and interpretation of the Office are entitled to deference.”).

³⁸ See e.g., *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194, 1199 n.3 (9th Cir. 2020) (finding that *Compendium’s* definition for a unit of publication aligns with “what we ascribe as its unambiguous and plain meaning”); *Olem Shoe Corp. v. Washington Shoe Corp.*, 2015 U.S. App. LEXIS 434, at *20-21 (11th Cir. Jan 12, 2015) (finding that the *Compendium’s* construction of the Copyright Act’s requirements for disclaiming preexisting works during registration “merits deference”); *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 684 (9th Cir. 2014) (finding the *Compendium* “persuasive” concerning the registration requirements for databases); *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network, Inc.*, 888 F. Supp. 2d 691, 706-07 (D. Md. 2012) (deferring to the *Compendium* concerning the registration requirements for collective works); *Rogers v. Better Bus. Bureau of Metro. Houston, Inc.*, 887 F. Supp. 2d 722, 732 (S.D. Tex. 2012) (“The Copyright Office’s ‘policy statements, agency manuals, and enforcement guidelines’ do not carry ‘the force of law,’ but they are entitled to some deference given the ‘specialized experience and broader investigations and information’ of the agency.”); *McLaren v. Chico’s FAS, Inc.*, 2010 U.S. Dist. LEXIS 120185, at **9-10 (S.D.N.Y. Nov. 9, 2010) (concluding that the Office’s interpretation of the unit of publication regulation “is particularly compelling”).

ators, small businesses, and new employees designated to file applications for companies that do not have experience with copyright law or registration practices. The Office makes every effort to provide a wide range of resources available to the public, creators, and copyright owners, including the *Compendium of U.S. Copyright Office Practices, Third Edition*; Office circulars; videos; FAQs; help text; and application instructions. Yet a significant number of applicants need assistance with the application process either through correspondence with examiners or by contacting the Public Information Office. Given the 25% correspondence rate annually, the interaction with examiners as intermediaries in the registration process plays an important role in improving the public record and resolving many issues prior to the issuance of a certificate of registration.

C. The Lesser-Known Benefits of Registration

What follows are examples of common questions that can arise in the course of determining whether the legal and formal requirements of Title 17 or the regulations have been met, or whether the application, deposit, and fee have all been received by the Office in proper form. These questions have been organized into four general categories: (1) questions about the work; (2) questions about authorship; (3) questions about the deposit; and (4) other common questions. This listing is illustrative but is by no means exhaustive. These scenarios provide a helpful snapshot of the ways in which the registration examination process assists both applicants and the courts in identifying and resolving important questions prior to issuing a certificate of registration, refusing registration, or closing a claim due to the failure to timely respond to examiners' questions.

1. Questions About the Nature and Scope of the Work Being Examined

This group of questions helps identify the work as a whole and the relationship between the claim in copyright and that work. The statute identifies three broad types of works: wholly new authorship, derivative works, and compilations that include collective works. The statute also identifies eight categories of copyrightable subject matter. Any of the three statutory types of work may include one or more categories of copyrightable subject matter. The work as a whole may not extend to every type of authorship within the work that is authored or owned by another or previously published. Ensuring clarification of the four corners of the work as a whole and, as precisely as possible, the extent of the claim is an important part of an examiner's role. This determination involves an understanding of the interrelationship between many parts of the Copyright Act such that the clarification by examiners may be of great assistance to the courts in understanding the scope of the claim. While a particular part

of a work may be included in the deposit of a registered work, that part is not necessarily included in the scope of the registration and may require separate registration. The type of work and the scope of the claim may also affect the availability of statutory damages and attorney's fees.

What is the original work of authorship being claimed?

While this may seem like a relatively simple question, often a vexing problem. While there are many categories and classes of works in terms of subject matter, the statute only anticipates three types of works in the legal sense. There are original works, derivative works, and compilations (which include collective works). Examiners must attempt to identify which of those three kinds of works are at issue.

In addition, works may include preexisting material or works created by other authors. In some cases, the work being registered may be a derivative work or collective work; but in other cases, that work may, in turn, contain component works that may have involved a transfer of ownership, a license to use, constitute a fair use, or were incorporated unlawfully. There is only so much information that an examiner can obtain from an applicant but attempting to clarify the work is an important starting point. In addition, applicants often attempt to register parts of works. Depending on the nature of the work as a whole, this may or may not be possible. As will be discussed below, the resolution of these issues may be implied by facts surrounding the creation of the work, i.e., was this a work by one individual, a joint work, a work made for hire, or does the work include preexisting material that is either included or excluded from the claim? Clear answers to these questions determine the author(s) of the work and the initial copyright ownership of that work in almost all cases.

Does the deposit represent sufficient copyrightable authorship?

This question of originality is the most commonly understood part of the examination process but is typically not a common problem. As the Court stated in *Feist*, “[t]he vast majority of works make the grade quite easily.”³⁹ Sufficient creativity is not a stringent bar to meet and only about three percent of applications are refused for a lack of sufficient creative authorship. The issue arises most commonly with visual arts works (standard jewelry designs, common textile patterns, minimalist logos, emojis, etc.) and in works where the claimed creative authorship lies in the selection, coordination, or arrangement of component elements. But in every category of authorship, there is some point at which the level of creativity may be too low to support a claim in copyright and examiners in

³⁹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 111 S. Ct. 1282, 1287 (1991).

each Division regularly flag such claims, often for consultation with a Division supervisor. In the relatively small percentage of claims where insufficient creativity does lead to a refusal and a subsequent request for reconsideration, it is not uncommon for the creativity in the argument for copyrightability to be far more creative than the creativity demonstrated in the work itself.⁴⁰

Does the work fall within one or more of the categories of copyrightable authorship established by Congress in section 102(a)?

This inquiry is relatively rare, and often leads to questions of first impression for the Office and the courts. Claims in DNA sequences, yoga sequences, and genetically modified plants, animals, or fish are among the types of claims that have failed under this legal requirement. In addition, categories of authorship with a definitional limitation may also implicate this consideration. For example, because Congress stated in the legislative history that choreographic works do not include social dance steps or simple routines,⁴¹ some dances or physical movements fail to fall within this category of copyrightable subject matter.

Is there any question about the claimed work being independently created?

Independent creation is not typically challenged by the Office. However, in situations where a claim is unusually similar to a well-known work or where independent creation seems implausible, an examiner may correspond with the applicant to obtain a written response about independent creation on the record.

What kind of statutory work is involved: an entirely new work, a derivative work, a compilation, or collective work?

As discussed in the previous section, understanding the nature of the work being claimed assists in ordering some of the questions relevant to that type of work as a legal matter. If the work was an entirely new work that does not incorporate any preexisting works, the analysis may be relatively simple. If the work is a derivative work, an explanation of what underlying work(s) is being recast, transformed, or adapted can be clarified in the limitation of the claim field of the application. If the work is a compilation or collective work, sufficiently creative selection, coordination, or arrangement of the component elements must be demonstrated in

⁴⁰ See also BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 46 (1967) (“[T]o make the copyright turnstile revolve, the author should have to deposit more than a penny in the box . . .”).

⁴¹ H.R. REP. NO. 94-1476, at 54 (1976), reprinted in 1976 U.S.C.C.A.N 5659, 5667.

the deposit. With respect to collective works, there may also be questions about whether the claim extends to component works that were either authored by the collective work claimant or for which all exclusive rights have been transferred to the claimant. In the absence of any express transfer of ownership in the component works, a registration of a collective work is presumed to include only the original selection, coordination, and arrangement unless a transfer of copyright ownership in all rights in a component work can be established at the time of registration.

If the work is a derivative work or compilation/collective work, has any part of the work been used unlawfully?

This has been a challenging issue for examiners. On the one hand, the statute does not bar the registration for a work in which a component element has been used unlawfully but it does preclude the registration from extending to any work that was used unlawfully.⁴² Therefore, the Office has concluded that there is no statutory basis to refuse a creative derivative work or compilation that incorporates material unlawfully unless the derivative authorship is inseparable from the preexisting material.⁴³ The Office also recognizes that Congress used the term “unlawfully” to encompass all lawful uses, including fair uses, and not only uses expressly authorized by the copyright owner.⁴⁴

On the other hand, a certificate of registration creates a permanent record of the claim in copyright. Even a voluntary cancellation will not expunge the copyright record. In some cases, applicants may not understand copyright law and may not realize that derivative works cannot incorporate preexisting works unlawfully. Examiners attempt to inform applicants of problems or misunderstandings that could create a perma-

⁴² 17 U.S.C. § 103(a).

⁴³ *Id.* 57-58 (1976), reprinted in 1976 U.S.C.C.A.N 5659, 5670-71 (In providing that protection does not extend to “any part of the work in which such material has been used unlawfully,” the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized.)

⁴⁴ *Id.* at 58 (“Under this provision, copyright could be obtained as long as the use of the preexisting work was not ‘unlawful,’ even though the consent of the copyright owner had not been obtained. For instance, the unauthorized reproduction of a work might be ‘lawful’ under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted.”).

ment record of infringement.⁴⁵ The goal is not to demand evidence of authorization but to prevent unintended infringement due to a lack of understanding of copyright law.

The legislative history provides some additional information on this issue.⁴⁶ The Office may cite such information when corresponding to applicants. By identifying relevant legislative history when addressing a legal issue in a claim for registration, not only does the citation provide context for applicants but having this information in the record may assist courts in considering whether or not this legal resource is helpful in the context of an infringement action.

If there is any question of whether the material may have been used unlawfully, such as in the case of an apparent unauthorized derivative work, the Examiner may ask the applicant to confirm that this material should not be excluded or provide the applicant with the opportunity to withdraw their claim if the applicant did not understand that unlawful use of a preexisting work could result in permanent public record of infringement. However, if the applicant asserts a lawful use, including fair use, the Office will proceed with registration, while preserving the applicant's assertion in the record. The Office will not assess or make any determination regarding whether a particular work is in the public domain or whether an applicant's use was "fair" within the meaning of 17 U.S.C. § 107. Rather, the Examiner will give the applicant the opportunity to explain their use in writing and will take the applicant's assertions at face value.

If the work is a derivative work or compilation/collective work, has preexisting material employed in the work been sufficiently excluded from the claim, including previously published material, previously registered material, or material that is not fully owned by the claimant?

⁴⁵ For instance, the Office receives many claims in musical arrangements where there is concern that the applicant does not realize that the underlying work may only be used lawfully.

⁴⁶ H.R. REP. NO. 94-1476, at 57-58 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5670-71 ("The second part of the sentence that makes up section 103(a) deals with the status of a compilation or derivative work unlawfully employing preexisting copyrighted material. In providing that protection does not extend to 'any part of the work in which such material has been used unlawfully,' the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized.").

In many claims, the applicant fails to identify and exclude preexisting material in the claimed work such as previously published material (subject to a different duration of protection), previously registered material, and/or material created by a third party in which all rights have not been transferred to the claimant named in the application. This legal requirement of registration is critical in limiting the scope of the claim. It may also be essential to determine if the plaintiff is entitled to claim statutory damages and attorney's fees for infringements that occurred before the work was registered or within three months after the work was first published. For example, new versions of a work must exclude previously published versions of that work. The claim in a derivative work or compilation extends only to the new material added by the author of that derivative work or compilation and does not extend to any previously published or previously registered material even if created by the same author.⁴⁷

2. *Questions About Authorship*

This group of inquiries can have many consequences for litigation. There are generally three types of authorship recognized by the statute: individual authorship, joint authorship, and works made for hire. The type of authorship may affect ownership, duration, termination, and the extent of statutory damages that may be available. Authorship questions may also interrelate with the type of work questions discussed above. Having examiners spot potential inconsistencies between the claims in the application and the statements in the deposit can serve to either resolve those inconsistencies or create a correspondence record that may alert courts and litigants to potential issues that require further inquiry. Questions about authorship may also involve clarifying ownership issues and the status of preexisting works included within a work. Generally speaking, works authored by others may be included within larger works in three different ways: (1) there may have been a transfer of ownership to the author or claimant of the larger work, (2) they may be incorporated lawfully, either by permission, non-exclusive license, or by law (e.g., fair use), or (3) they may have been incorporated unlawfully. There are an enormous number of factual variations that can arise in the application of the complex and inextricably intertwined aspects of copyright law in any particular case. Examiners' experience with these varied combinations of issues provide an important front line for spotting these issues prior to a claim reaching a federal court.

Is the complete work authored by an individual, joint authors, or is the complete work a work made for hire?

⁴⁷ 17 U.S.C. § 103(b).

Applicants sometimes attempt to register portions of works that they authored. Sometimes this is possible and sometimes it is not. In some cases, a preexisting work that has been included within another work (such as a photograph that has been licensed for use in a book) that was not fully owned by the author of the larger work at the time of registration or was previously published (and therefore must be excluded from the larger work) could be registered separately. On the other hand, works that are interdependent or inseparable parts of a larger work may not be separately registrable. A musical work that includes music and lyrics each written by separate authors is a classic situation of a joint work, and each author cannot separately register their respective contributions if they were intended to be merged into an interdependent whole. However, if an author creates a poem and another author later obtains permission to add music to that poem as a derivative work, each author may register those individual works separately. The difference between those two examples is the intention to merge at the time of creation.⁴⁸ In the first example, the authors of the music and of the lyrics clearly intended to merge their interdependent contributions into a unitary whole. In the latter example, the author of the poem intended to create an independent work at the time of creation; the author of the music intended to incorporate that preexisting work by adapting, transforming, or recasting that work into a new work.

Similar to the *Garcia* decision, if a performer in a band seeks to register her individual performance in a sound recording separately from the sound recording as a whole, the Office would typically refuse if the facts indicated that the performers in that work were either joint authors of the sound recording, or the sound recording was created as a work made for hire. If a producer remixed that sound recording in a sufficiently creative manner, there could be a claim in a derivative work of the original sound recording. The factual variations are endless.

Can the work be subdivided into separate works that could be registered separately?

This analysis overlaps with the considerations in the previous question. Collective works regularly fall into this category. A collective work author may creatively select, coordinate, or arrange preexisting works in such a way that the work as a whole constitutes an original work of authorship. The collective work author may not fully own any of the preexisting works included in the collective work. Each author of a component work incorporated into the collective work may separately register each of their individual contributions to the collective work. Even if the collective work

⁴⁸ H.R. REP. NO. 94-1476, at 120 (1976), reprinted in 1976 U.S.C.C.A.N 5659, 5736.

author fully owned all rights in a particular contribution to that collective work, another registration for the same version may be made by the author in his or her own name as copyright claimant.⁴⁹

Is the work a joint work that includes one or more authors that are employees for hire?

This is an issue that does not arise often but is important to clarify when it does. When a work involves more than one author and one or more of the authors is a corporate entity, the “work” is not “made for hire” but rather some of the authorship is contributed by an “employee for hire.” This would most likely indicate that the work being registered is a joint work rather than a work made for hire *if* there was an intent to merge those contributions into inseparable or interdependent parts of a unitary whole. The work made for hire principle relates to the authorship of an entire “work.” In other words, if one corporate author and one individual author intend to merge their contributions into interdependent or inseparable parts of a unitary whole, that would establish a claim in joint authorship. This distinction could be significant for termination purposes as well as duration.⁵⁰ In contrast, the work could be a collective work if the claim involved a number of contributions, constituting separate and independent works in themselves that were creatively arranged into a collective whole.⁵¹ Either of such claims could be works made for hire if all of the authors met all of the requirements of the second part of the § 101 definition.⁵²

3. Questions About the Deposit

Questions about the deposit are critical to determine whether the application package (application, fee, and deposit) were submitted in proper form and whether the Office received a complete work or a sufficient deposit in accordance with Office regulations. Courts must always rely on the Office to determine precisely when the deposit was received in order

⁴⁹ 37 C.F.R. § 202.3(b)(11)(ii).

⁵⁰ SUPPLEMENTAL REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 1965 REVISION BILL, 89th Cong., Copyright Law Revision, Part 6 89-90 (Comm. Print 1965) [hereinafter SUPPLEMENTAL REPORT] (“[T]he bill does not explicitly cover the case where a ‘joint work’ was written by two persons, one of whom was an employee for hire. In this situation the provisions of subsection [302] (b) would not apply; the term would be based on subsection [302] (a) (the life of the individual author plus 50 years) or subsection (c) (75 years from publication or 100 years from creation), whichever is longer. Although this situation is by no means rare, it seemed unnecessary to burden the bill with special provisions dealing with it.”).

⁵¹ *Supra* note 32.

⁵² 17 U.S.C. § 101 (definition of “work made for hire”).

to determine the effective date of registration for purposes of eligibility for statutory damages and attorney's fees. The deposit also generally delineates the four corners of the work being registered and is often a critical piece of evidence in litigation. Where works are revised over time, the deposit submitted may clarify whether the material infringed was included within the deposit(s) registered.

Are there potential fixation problems?

Because the Office must receive a fixed deposit to establish an effective date of registration and to examine the work, fixation is normally satisfied. However, problems arise when the individual works within a collective work are fixed separately without demonstrating the manner in which those parts were coordinated or arranged within the work as a whole. This occurs frequently with claims in websites in which disassembled pages of the website are deposited. In order to consider multiple pages of website as one work, the deposit must reveal the selection, coordination, or arrangement of those pages in a fixed form.

Other challenges can arise when identifying material is used to depict the work.⁵³ Applicants often confuse the form of the deposit with the claimed work itself — the subject of the identifying material. If a photograph or illustration is used as the identifying material for a sculptural work, applicants sometimes claim the photograph or illustration rather than the sculptural work, or in addition to the sculptural work. This issue appeared to cause confusion even to the Supreme Court in the *Star Athletica* decision.⁵⁴ The works being claimed by Varsity Brands were two-dimensional artworks. The deposits for these claims were drawings and photographs illustrating how the claimed designs were applied to cheerleader uniforms. There was no claim in the uniforms themselves. The Court rejected the Government's argument that only the two-dimensional artwork depicted in the drawings and photographs were registered because neither party had advanced this argument below.⁵⁵

There has also been confusion about when identifying material is permissible and when it is not. For instance, an advertising catalog or website of clothing may include photographs or illustrations of such clothing or

⁵³ Identifying material is not the work itself but a representation of the work. Identifying material is common for sculptural works including jewelry where the work itself is not deposited but an illustration or photograph is deposited to depict the work being claimed. See 37 C.F.R. § 202.20(c)(2)(xi).

⁵⁴ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017); *but see* 137 S. Ct. at 1019 n.4 (Ginsberg, J., dissenting) (“The majority declines to address this route to decision because, it says, Varsity has not advanced it. . . . I read Varsity’s brief differently.”).

⁵⁵ *Id.*, at 1006-07.

other merchandise. A catalog may constitute a collective work of photographs, illustrations, and literary authorship. Collective works cannot be used as identifying material for the two or three-dimensional works depicted or described in the photographs, illustrations or literary works contained within the collective works.⁵⁶

The deposit can also implicate subject matter problems, such as if an applicant submits a video of a firework display and seeks registration for the fireworks display as such. Video is an appropriate mode of fixation for movement-based works, and this video would be a perfectly acceptable for a claim in the motion picture. But this video would not result in a registration for the fireworks display because the subject of the video is not within a category of copyrightable subject matter.⁵⁷ . Thus, these questions may be intertwined with other questions regarding the legal and formal requirement of title 17.

Does the deposit contain the complete work?

This question arises relatively frequently and can take myriad forms. In many claims, this goes back to the first question: what is the work? Many applicants try to register parts of works instead of registering the complete work.

In considering the complete work,⁵⁸ it is important to determine whether or not a claim in a part of the work is separable or inseparable. An example of this arose in *Garcia v. Google Inc.*,⁵⁹ which involved an applicant's attempt to register their acting performance separately from the motion picture she appeared in. An en banc panel of the Court of Appeals for the Ninth Circuit noted the Copyright Office's refusal to register her performance separately from the film, stating: "it comes as no surprise that during this litigation, the Copyright Office found that Garcia's performance was not a copyrightable work when it rejected her copyright application. The Copyright Office explained that its 'longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.'"⁶⁰ Thus, the Ninth Circuit agreed with the Office that, "[f]or copyright registration purposes, a motion picture is a single integrated work," and that if Ms. Garcia's contribution was limited to her acting performance, her performance could not be registered apart from the motion picture.⁶¹

⁵⁶ COMPENDIUM (THIRD), *supra* note 9, § 914.

⁵⁷ *Id.* § 904.

⁵⁸ 37 C.F.R. § 202.3(b)(11)(iii).

⁵⁹ *Garcia v. Google Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc).

⁶⁰ *Id.* at 743.

⁶¹ *Id.* at 741. The court noted that "Garcia's theory of copyright law would result in the legal morass we warned against in *Aalmuhammed* — splintering a movie

The Office would reach the same outcome if one performer in a sound recording attempted to register their individual performance. At the same time, the Office would accept a claim in the sound recording as joint authorship or a work made for hire even if it were “adverse” to a prior registration.⁶²

The same concern could arise in a work with text and illustrations. Even though separate authors may have created different parts of the work, that are able to stand on their own as independently authored works — the text and illustrations cannot be registered separately if the elements were created with the intent that their contributions be merged into inseparable or interdependent parts of a unitary whole.⁶³ In most such cases, there would be an expectation of collaboration in the creation of such a work and a presumption that the work was created through joint authorship.⁶⁴ Alternatively, it is conceivable that one author’s contribution was a derivative work that transformed, recast, or adapted the author author’s contributions, such as illustrations that were based on preexisting text (or vice versa).

The determination of whether component elements of a work constitute one work (e.g., a joint work, derivative work, compilation/collective work) or separate works is also an important determination with respect to statutory damages.⁶⁵ Thus, the Office must be cautious in providing an

into many different ‘works,’ even in the absence of an independent fixation. Simply put, as Google claimed, it ‘make[s] Swiss cheese of copyrights.’” *Garcia*, 786 F.3d at 742; *see also* 16 *Casa Duse, LLC v. Merkin*, 791 F.3d 247, 257-58 (2d Cir. 2015) (finding the Office’s interpretation of title 17 in the *Garcia* case persuasive).

⁶² The Office does not have a process for administratively adjudicating conflicting claims in a work (e.g., authorship or ownership), but will allow such conflicting claims to be registered as adverse claims that may be resolved by either party initiating an action in federal court.

⁶³ 17 U.S.C. § 101 (definition of “joint work”).

⁶⁴ *See, e.g.*, UNITED STATES COPYRIGHT OFFICE, COPYRIGHT LAW REVISION PART 6: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89TH CONG. 65 (Comm. Print 1965). (“Under the definition a work would not be ‘joint’ unless its authors collaborated among themselves or unless each of the authors knew, at the time the work was being written, that his contribution would be integrated as an ‘inseparable’ or ‘interdependent’ part of a ‘unitary whole.’ Common examples of ‘inseparable’ parts would be the contributions of co-authors to a short story or novel, while the words and music that comprise a song, or the many contributions that go to make up a motion picture, would be examples of ‘interdependent’ parts. The definition of ‘joint work’ should be compared with that of ‘collective work’ which, under section 101, involves the assembly of ‘a number of contributions, constituting separate and independent works in themselves * * * into a collective whole.’”)

⁶⁵ 17 U.S.C. § 504(c)(1) (“For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.”).

evidentiary presumption for a claim that seems implausible with respect to the creation of separate, independently created works.

Does the deposit support the claim, or does it contain contradictions to the facts stated in the application?

It is very common for examiners to find inconsistencies between the facts stated in the application and the deposit submitted. Authorship discrepancies are common as are assertions about the date of publication. For example, in many submitted website claims, the date of publication listed in the application precedes dates appearing in the deposit. Many of these inconsistencies can be resolved through correspondence but a significant number of claims also require a corrected deposit. When a new deposit is submitted, the effective date of registration must be revised to reflect the date that the deposit was received in proper form.

It is also common for an application to name a different person or entity from the author as claimant without providing a corresponding transfer statement explaining how the claimant obtained ownership of all of the exclusive rights in the copyright from the author as required by § 409(5). This will be discussed in further detail below; it is important to note, however, that there are some statements that the Office accepts at face value. For instance, an applicant may state that a work is a work made for hire but the Office will never require proof of employment or evidence of a signed written work made for hire agreement. Absent any contradictory information in the registration materials, the Office will accept the applicant's assertion that the work was made for hire.⁶⁶ There is a rebuttable evidentiary presumption of the validity of the copyright and the facts stated in a certificate of registration;⁶⁷ however, it is important for courts to recognize that the Office does not require evidentiary support for factual assertions related to authorship or ownership. Indeed, U.S. Copyright Office staff are prohibited from interpreting legal documents or providing legal advice of any kind.⁶⁸ Examiners will look for inconsistencies between the factual statements made in the application and the material deposited and may take administrative notice of such inconsistencies in any provided legal documents.⁶⁹ Examiners also ensure that responses to correspondence about identified inconsistencies are preserved in the registration record.

⁶⁶ See, e.g., *Morelli v. Tiffany & Co.*, 186 F. Supp. 2d 563, 566 (E.D. Pa. 2002).

⁶⁷ 17 U.S.C. § 410 (c). The presumption only applies to works registered within five years of publication.

⁶⁸ See e.g., 37 C.F.R. § 201.2(a)(3).

⁶⁹ COMPENDIUM (THIRD), *supra* note 9, § 301.2.

Have multiple deposits been submitted? Are these multiple deposits identifying material for the same work or do the deposits represent different works?

There are situations in which the submission of multiple representations of a work are acceptable as a deposit. For example, for sculptural works and other 3-D artwork, including jewelry designs, the applicant may submit identifying photographs and/or illustrations from different perspectives to depict the entire work. However, in many cases involving online works, applicants will submit many individual files as the deposit for the work, often in a .zip file. Applicants seeking registrations of websites often upload hundreds (or even thousands) of screenshots of webpages. Such deposits are usually unacceptable because they do not provide a fixed deposit containing the selection, coordination, or arrangement of the pages. Without such selection, coordination, or arrangement, it is impossible to determine if these files can potentially be registered as a collective work. Instead, these disassembled files must be deemed separate works that can only be submitted on one application if there is an applicable group registration option.⁷⁰

If multiple deposits are included, should this claim have been submitted on a particular group application?

It is common for applicants to submit multiple works on a Standard Application which is designed for individual works (including derivative works and collective works as defined in the statute). However, subject to only a few exceptions, the Standard Application cannot be used for registration of multiple works. The exceptions to this rule are: (1) units of publication involving multiple, physical works distributed to the public as a self-contained unit, e.g., a board game or a CD containing a collective work together with cover art and liner notes;⁷¹ or (2) group registration of updates to a database or a group of secure test items (the only group registration options that may be submitted with the Standard Application or a paper form).⁷²

The Office recognizes that applicants may not understand Copyright Office practices. Consequently, in certain situations, examiners will register one of the works submitted, rather than refuse the entire application.

⁷⁰ Applicants often demand that the Office provide information about how to “fix” such online works. The Office has provided some technical options in the *Compendium of U.S. Copyright Office Practices, Third Edition* § 1010.1, but it is not within the Office’s function to provide technological solutions to technical problems.

⁷¹ See 37 C.F.R. § 202.3(b)(4).

⁷² COMPENDIUM (THIRD), *supra* note 9, § 1117.4; 37 C.F.R. §§ 202.3(b)(5)(ii)(A), (b)(2)(ii)(A).

The examiner also will inform the applicant of the regulatory requirements for registering the remaining works. However, the Office does not currently have the technological flexibility to convert these applications into corresponding group options that may exist, or to easily assess the additional fees this process would require.⁷³

The registration of multiple works on one application may depend on whether a corresponding group registration option exists for the type of works submitted. While the number of group registration options has increased somewhat in recent years, the general rule is that one work may be registered with an application.⁷⁴ Relatively few group registration options exist.⁷⁵

Does the “work” deposited appear to contain multiple authors but only one author has been listed in the application?

Frequently, inconsistencies regarding authorship occur between the application and the deposit. If one author or multiple authors are listed in the application but the deposit contains additional authorship information, the Office will correspond with the applicant to attempt to correct the discrepancy in an appropriate manner (other than in a collective work situation involving authors of component works).

Do the titles of the work(s) match the title(s) of the deposit(s)?

Discrepancies between the title of the work listed on the application and the title appearing on the deposit is a significant problem for examiners, particularly in group registration options. If an applicant lists ten titles in an application and then uploads ten files with inconsistent or unrelated file names, the examiner does not know whether they received the correct deposits and cannot accurately exclude particular works that may not be copyrightable or meet other legal and formal requirements of registration.

⁷³ The current fee for the Standard electronic application is \$65.00. Filing fees for group options range from \$55.00 to \$500.00. *See* 37 C.F.R. § 201.3 for an up-to-date list of a ll U.S. Copyright Office fees. [The cheapest group option is GRUPH/GRPPH, which costs \$55. The fee for GRSE is technically \$35, but you have to submit at least two issues and you have to pay \$35 per issue. So the minimum price for those claims is \$70.]

⁷⁴ 37 C.F.R. § 202.3 (b)(11).

⁷⁵ All currently offered group registration options are provided by 37 C.F.R. § 202.3(b)(5) (Group registration of databases) or by § 202.4: § 202.4(c) (Group registration of unpublished works); § 202.4(d) (Group registration of serials); § 202.4(e) (Group registration of newspapers); § 202.4(f) (Group registration of newsletters); § 202.4(g) (Group registration of contributions to periodicals); § 202.4(h) (Group registration of unpublished photographs); § 202.4(i) (Group registration of published photographs); § 202.4(j) (Group registration of short online literary works); and § 202.4(k) (Group registration of secure test items).

In some recent group registration options, the Office has required the titles to be identical to the file names to avoid this problem.⁷⁶ In the case of uploaded files, applicants sometimes upload the wrong file by mistake and the discrepancy may require a new deposit.⁷⁷ With physical deposits, sometimes there are simple minor discrepancies between the titles; and examiners will correspond with the applicant to determine which title is correct and will appear in the public record of the Office. In rare cases, it may be that the applicant has submitted the wrong work or intends to register a different version of the work.

If the work was published, was the applicant required to submit a physical copy of the best edition of the work to the Office for the benefit of the Library of Congress?

One of the duties of examiners is to ensure that the applicant provides the deposit(s) that meets the legal and formal requirements of title 17 and Copyright Office regulations. If a work is unpublished, generally, one complete copy of the work in any form is sufficient for the deposit.⁷⁸

For works published in physical form, two complete copies of the “best edition”⁷⁹ must be submitted as the deposit for works first published in the United States.⁸⁰ This is a legal and formal requirement of registration. If an electronic copy was uploaded rather than the best edition of the work as specified in the Copyright Office regulations, examiners will correspond with the applicant to obtain the proper deposit. Although submission of the incorrect deposit can change the effective date of registration, where applicants attest that a digital copy is identical to the physical best edition version of the work, examiners may allow applicants to retain the earlier effective date of registration if the proper deposit is later received by the Office.

⁷⁶ See e.g., 37 C.F.R. §§ 202.3(h)(10) (requiring application titles match uploaded file names for group registration of unpublished photos); 202.3(i)(10) (requiring same for group registration of published photos); 202.3(j)(7) (requiring same for group registration of short online literary works).

⁷⁷ This will change the effective date of registration.

⁷⁸ 17 U.S.C. § 408(b)(1). There are exceptions. For instance, for group registration of unpublished works, the deposits must be uploaded in electronic format. And all uploaded electronic files must comply with the Office’s list of acceptable file formats. See *eCO Acceptable File Types*, COPYRIGHT.GOV, <https://www.copyright.gov/eco/help-file-types.html> (last visited Mar. 10, 2021).

⁷⁹ 17 U.S.C. § 101. (“The ‘best edition’ of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.”).

⁸⁰ *Id.* § 408(b)(2); see also, 37 C.F.R. § 202.20.

Did the applicant request special relief from the applicable deposit requirements and provide sufficient justification acceptable to the Office in consultation with the Library of Congress?

There are times when the applicant may be unable to meet the best edition requirements and may request “special relief” from those deposit requirements.⁸¹ Applicants may no longer be able to obtain the original best edition copies of works and may instead wish to submit complete lower quality copies. This may occur with the originally distributed version of an album, book, or motion picture is no longer available in the market, but electronic copies, paperback copies, or DVDs are the only complete copies still available for those works. Before a request is granted, the Office must consult with appropriate officials within the Library of Congress and may be subject to any conditions that the Register requires.⁸² Such a condition might include the need to provide relevant metadata with an electronic copy. If the Library does not agree to waive the best edition requirement, the application will be refused unless the applicant submits the required best edition copy or copies. Generally, where best edition copies are no longer available or are unreasonably expensive, a grant of special relief will be approved.

Does information about the date of completion of the work or the date of publication match information contained in the deposit?

Examiners frequently encounter discrepancies between the date of publication in the application and information that appears in the deposit, particularly in the case of online works and websites. If the date of publication is listed as 1/1/2020, the deposit must be a copy of the work as it existed on that date. If the deposit contains a date after the listed date of publication, the Office will demand either a new deposit or permission to correct the date of publication listed in the application.

If there is material in the deposit that appears to have been published prior to the date of publication listed in the application, such previously published material must be excluded from the claim. This is a common problem with computer programs. Applicants will often attempt to register a derivative version of a computer program but fail to exclude previously published versions of the program. However, a claim in a derivative work only extends to the new material added to the previously published

⁸¹ 37 C.F.R. § 202.20(d).

⁸² *Id.*

work and does not extend to the preexisting material.⁸³ Preexisting material must be registered separately based on the date of publication.⁸⁴

4. *Common Additional Questions*

There are a host of other inquiries that may be necessary to properly examine the claim, align the claim to the legal requirements of section 409, or to create an accurate public. The following are a few representative issues that frequently occur.

If the author and claimant are different, was there an acceptable transfer statement explaining how the claimant obtained ownership of all rights in the work?

Where the claimant is different from the author, the statute requires a brief statement of how the claimant obtained ownership of the copyright.⁸⁵ With respect to Copyright Office applications, this is known as the transfer statement because a third party has been named as the copyright claimant and all of the exclusive rights of the author must have been transferred to that party. If less than all rights have been transferred, the author(s) may always be listed as the claimant(s) and where the author(s) and claimant(s) are the same, there is no need for a transfer statement. On the other hand, if joint authors are listed as co-authors of the work but only one of the authors is listed as the claimant, a transfer statement would

⁸³ 17 U.S.C. § 103(b) (“The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”). Some courts have misinterpreted this subsection and allowed derivative work registrations to extend to previously published versions of the work if the same author created the preexisting works and the derivative work. That interpretation misreads the first clause of the sentence: “The copyright in a compilation or derivative work extends only to the material contributed by the author *of such work*,” In the context of the sentence, “such work” refers to “the compilation or derivative work.” As § 103(b) attempts to clarify, the copyright in a derivative work extends only to the material contributed by the derivative work author — the new material added to the preexisting or previously published material.

⁸⁴ As a rule of thumb, for works that are frequently updated, the most important registration is often the registration of the *first* version of the work. Any later infringement of derivative versions of the work will often infringe some copyrightable elements of the original work. Periodic registrations of significant revisions to the original work will protect the creator in most cases if registration of every update is too burdensome.

⁸⁵ 17 U.S.C. § 409(5).

be necessary to clarify how that author obtained the interests of the other joint author(s).

Did the applicant properly request special handling such that the claim must be reviewed within five business days?

An applicant may also request “special handling” of an application if the applicant meets certain requirements and upon payment of the required fee.⁸⁶ This is particularly useful for prospective litigation. However, applicants occasionally use special handling to attempt to pressure examiners to resolve complex problems in the applications or deposits quickly. The Registration Program has established strict practices to ensure that examiners review such applications within five business days and refer problematic claims to supervisors expeditiously. Given that many of these claims are likely to be involved in litigation, Registration staff take extra care to ensure that these claims are resolved as quickly as possible while ensuring that the examination of the legal and formal requirements of Title 17 and the regulations are strictly met. Where applicants submit special handling requests in proper form and the applications and deposits meet all of the legal and formal requirements, registrations for these claims can occur as quickly as one business day. When problems with the legal and formal requirements are identified, examiners attempt to resolve the problems through correspondence with the applicants as quickly as possible.⁸⁷

Did the applicant add information in the notes to the Copyright Office or in an uploaded document that raise contradictions to the claim or seeks some form of accommodation that will likely require correspondence with the applicant?

Applicants often provide additional information in the “Notes to the Copyright Office” filed. When this information is contradictory to the facts provided in the application or other registration materials, the Examiner must correspond with the applicant to resolve the discrepancy in the registration record.

D. How These Inquiries Benefit Applicants and the Courts

The resolution of these questions is a central reason why Congress made registration or refusal to register a prerequisite to initiating a copyright infringement action in federal court. Resolving these questions with the Office prior to initiating an infringement claim assists courts in identi-

⁸⁶ See UNITED STATES COPYRIGHT OFFICE, CIRCULAR 10: SPECIAL HANDLING (2020), <https://www.copyright.gov/circs/circ10.pdf>.

⁸⁷ COMPENDIUM (THIRD), *supra* note 9, § 623.

fyng 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.

The questions above are merely examples of the types of issues that may need to be considered by an examiner every time he or she opens a new claim for examination. Most claims do not raise concerns with respect to any of these questions. But approximately twenty-five percent of the applications received annually do involve one or more of these issues. That means that in 125,000 claims every year, the examination process provides significant potential assistance to the courts. And courts can take some comfort that in approximately 375,000 claims per year where the Office did not correspond, the Office did not identify a legal or formal problem with the claim. When these questions do arise, they take different forms across the wide spectrum of the categories and subcategories of copyrightable authorship — articles, serials, newsletters, computer programs, websites, databases, tweets, musical works, sound recordings, dramatic works, choreographic works, audiovisual works, motion pictures, photographs, 2-dimensional art, three-dimensional art, installation art, architecture, etc. Each category and class can involve unique issues that raise additional questions.

These categories or classes of authorship are also constantly evolving or morphing into new forms in the digital age. New types of works or new types of claims within the categories or classes of work are encountered by the Office sometimes years or even decades before the courts will wrestle with such questions.⁸⁸ The array, scale, and scope of the works received by the Office is, however, not as staggering as the factual variations in the claims and deposits received.

The examination of the facts stated within the application along with the examination of the deposit also lead to an improved public record of claims in copyright. The registration system establishes a historical public record of creativity in the country and provides information about the

⁸⁸ Not only are traditional concepts of works such as “serials” diminishing in the online world as more articles are published online first in chronological order before any collective work is created, but traditional claims in categories such as in choreography have been changing as the technologies enabling fixation of choreographic works become more prevalent. The evolving nature of works and the form in which they are fixed and published challenges the traditional concepts of certain types of works.

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

III. COPYRIGHT OFFICE MODERNIZATION

The Office has begun work on re-envisioning the Registration system for the twentyfirst century. This modernized system will significantly enhance the benefits of registration and the public record to applicants, the courts, the public, and the digital marketplace. The enhanced benefits anticipated are too voluminous to address in this article, but a few illustrative changes to the current system are worth noting.

1. Linking U.S. Copyright Office Records:

The Office's online public record provides information about registered works and recorded documents. However, the current system does not provide links between registrations and recorded documents related to registered works. Through ongoing modernization efforts, the Office intends to tie related documents together through searches in the Office's online public record system. For instance, linking basic registrations with supplemental registration and/or preregistration of that claim, and linking any related recorded documents, such as transfers of ownership or licensing information, would be beneficial to applicants, the courts, and the public.

2. Certificates of Registration and Refusals Available Online:

It would also benefit attorneys and the courts if certificates of registration and refusal letters were available in the online public record. Certified copies would continue to be offered by the Office, but the free availability of these documents could significantly improve the online public record.

3. The Addition of Refusals, Closures, and Appeals to the Online Public Record:

In addition to providing a registry of claims registered and documents recorded with the Office, the enhanced system must include an online record of refused claims, claims closed due to failure to timely reply to Office correspondence, and information related to administrative appeals within the Office and their outcome.

4. *Fostering the Use of Unique Identifiers:*

To facilitate transactions in the digital market and to disambiguate works, it would be extremely helpful to further encourage the use of unique identifiers of works (and authors or owners). The Office's current eCO system offers the ability to include identifiers in applications for registration from a dropdown menu, including, ISBN, ISSN, ISRC, etc., but these identifiers are rarely included in applications and the current system can only assign one identifier to the entire applications, even if the applicant is registering multiple works (as in the case of a group registration). The Office will continue to explore options for fostering enhanced use by applicants in the new system.

5. *Updating of Contact Information:*

The ability to update the contact information of owners, authors, or rights and permissions information in the Office's records for low cost or no cost could be enormously beneficial in facilitating licensed uses of registered works and reducing social inefficiencies related to the orphan works problem.

6. *Multiple Levels of Applicant Assistance within the Application:*

The Registration Program has long recognized that many creators and applicants are unfamiliar with copyright law, Copyright Office practices, and the nuanced eligibility requirements for registration applications. While the Office has devoted enormous time and energy to updating public information documents including the *Compendium of U.S. Copyright Office Practices, Third Edition*, U.S. Copyright Office circulars, and the U.S. Copyright Office website, applicants do not always avail themselves to these accessible, ancillary, and informative resources. The Registration Program believes that the optimal location for the provision of assistance to applicants is in the online registration system itself. Based on that belief, the Registration Program is working to ensure that the development of the new online registration incorporates understandable questions and multiple levels of help to applicants.

Applicants include a wide range of experience levels. Historically, applications have included legal terms of art and language that could be misunderstood by many applicants. At the same time, the Office does not want to burden experienced applicants with unnecessary questions that could make the process more cumbersome. The goal is to create processes that are user-friendly to all applicants and that provide off-ramps to obtain additional information for any part of any application. This could include an option to choose "I don't know" for many questions on the application that would provide multiple levels of help as needed, links to relevant Office documents for further information if desired, and even tools to assist

in answering certain questions that have consistently been a source of misunderstanding, such as publication and works made for hire.

All these concepts will be validated or improved through usability testing throughout the modernization process. An initial clickable prototype of the Standard Application for all three Divisions (currently the application used in approximately 74% of submissions) is expected to be completed in early 2021.

7. Creating an Account Message Center and Processing Tracker:

Currently, the eCO system is incapable of providing applicants with information about where an application is within the examination process or whether the Office is waiting for information from the applicant. The applicant receives a confirmation when an application and fee is submitted, but this confirmation does not include information about the receipt of deposits. A claim is “unworkable” until the Registration Program receives all three required parts of the application — the application, fee, and the deposit. Applicants may not be aware of a problem with any of these three elements until correspondence is sent via email to the applicant. In addition, applicants frequently claim that (1) they did not receive the correspondence; or (2) the applicant responded to the correspondence but it was not received by the Office or was not connected to the specific claim due to a number of complex reasons.

The Registration Program believes that the solution to these problems is the creation of an account message center in which status updates and any correspondence would be available as a record for the duration of the Office’s retention schedule. It is hoped that this message center will enable applicant accounts to be notified by text and email whenever a new event is entered into the message center, much like the communication systems used by banks, credit cards and doctors to notify customers of updates. The inclusion of web and business norms into the registration system is one of the primary goals of modernization.

8. Improved Statistical Information:

The current eCO system contains limited data points that limit the Office’s ability to provide detailed information about a wide range of questions that may be posed by the public or the Office, including managers within the Registration Program. Increasing the number of data points within applications as well as actions taken within the Office would enable much more robust research and reporting. For example, the Office’s Annual Reports provide information about literary works and serials or works of the performing arts and sound recordings (because these are separate applications within eCO), but the system is incapable of providing information about subcategories within the Literary Division (e.g., poems,

novels, non-fiction books, computer programs, websites, etc.) or the Performing Arts Division (musical works, dramatic works, choreographic works, etc.). Increased data points within a modernized registration system will enable more flexible and granular statistical information. The opportunities for research and reporting with such enhanced data are endless and could include geographic spatial information (GIS) that could reveal what types of creativity are occurring in particular geographic regions (e.g., Congressional districts or States) and enable visually demonstrating changes over time.

9. Enhancing the Availability of Correspondence Exchanges with Applicants:

Currently, correspondence between the Office and applicants can be obtained for a fee through the Office of Public Records and Repositories. Examiners correspond with applicants in approximately 25% of all applications on a wide range of issues, some of which are discussed in this article. This correspondence places questions and answers on the record and can be extremely important in litigation or even for the general public in understanding the scope of any claim. But many people are unaware that this information exists and currently this information is only available upon the submission of a formal request to the Office and the payment of the required fee to obtain copies of these records. Moving forward, a modernized copyright registration system would make the correspondence between the Office and the applicant freely available online.

10. Increasing the Ability to Submit Digital Deposits for Registration:

Currently, over 74% of applications for registration are submitted with digital deposits. “Best edition” requirements necessitate the submission of physical deposits for certain published works that are heavily concentrated in literary work submissions. While physical works may be preferable for the collections of the Library of Congress in certain circumstances, there are a number of ways in which physical deposits as a requirement for registration lead to inefficiencies and problems. Physical deposits must be sent through the U.S. Postal Service, are often sent from divisions of companies that are separate from the division submitting the applications, must go through multiple locations within the Library of Congress and the U.S. Copyright Office before reaching examiners, can be misrouted, and can be difficult or impossible to retrieve after registration if needed for litigation purposes. The problems with physical deposits have been exacerbated during the COVID pandemic when the majority of examiners were forced to telework offsite.

While digital deposits are not immune from their own problems, there are many benefits that could be obtained by increasing the option to sub-

mit deposits in electronic form rather than requiring physical deposits as a condition of registration.

IV. CONCLUSION

The registration process provides many unseen benefits to applicants and the courts. This article illustrates some of those benefits but by no means addresses many additional inquiries that examiners engage in that purposely serve to mediate legal and factual issues before they must be addressed by courts and before a public record of a registration claim is entered into the official public record of the U.S. Copyright Office. There are more benefits that can be achieved through the modernization process and a small subset of those possible enhancements have been touched upon in this article.

While formalities such as registration have been disfavored internationally for many years, in the digital environment, many countries are finding renewed interest in the potential benefits of a voluntary registration system and often look to the longstanding U.S. registration system for guidance. The modernization of the copyright registration system will further increase the benefits of registration to applicants, the courts, and the public as well as serve as a guiding light for renewed international interest in value that a voluntary copyright registration system can provide both nationally and internationally.