

**EXAMINING COPYRIGHT***by ZVI S. ROSEN\***TABLE OF CONTENTS*

I. Introduction: The Black Box of Copyright Examination ...	482
II. The Present of Copyright Examination .....	485
A. The Purpose of Examination .....	485
B. The Methods of Examination .....	487
III. The Past of Copyright Examination .....	490
A. 1781-1790 – State Copyright Laws .....	490
B. 1790-1870 – Era of Confusion .....	491
C. 1870-1909 – Era of Transition .....	495
1. Examination of Copyrights by the Librarian of Congress .....	496
2. Copyright Examination in the Patent Office .....	500
3. Rise of the Copyright Office	
D. 1909-1977 – The Era of Standardization .....	512
1. 1909-1945 – Creating a Modern Agency .....	513
2. 1946-1977 – A Modern Agency at Last .....	528
E. 1978-Present – A New Era, New Challenges .....	540
1. Statistics of Copyright Examination 1986-Present ..	543
2. Reconsidering Registration .....	547
3. Pendency of Applications .....	550
4. Reviewing Copyright Rejections .....	552
IV. The Future of Copyright Examination .....	556
A. Should We Examine? .....	557
B. How Should We Examine? .....	559
V. Conclusion: Looking Inside the Black Box .....	562

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## I. INTRODUCTION: THE BLACK BOX OF COPYRIGHT EXAMINATION

Copyright powers 12% of U.S. economic output in creative and related sectors,<sup>1</sup> and yet the mechanics of copyright registration have not been seriously studied. Although copyright protection is currently automatic, registration with the U.S. Copyright Office is needed to be able to effectively protect a copyrighted work, and unless the Copyright Office has examined the applications for an infringement lawsuit cannot be commenced. Like the Patent and Trademark Office, the Copyright Office examines registrations, and does not simply grant them as a matter of course. However, while the Patent and Trademark Office provides extensive data on examination,<sup>2</sup> the Copyright Office provides next to no data on the examination process. In this data vacuum it is frequently assumed that copyright registration is essentially automatic.<sup>3</sup> In this paper I will show that is incorrect, especially for some types of works, provide both a narrative and statistical account of copyright examination, and propose a new paradigm for examination focused on where substantive rejections actually occur.

In recent years, there has been increased attention on the examination process, spurred on by the Supreme Court's 2019 holding that a copyright owner only has standing to bring a copyright infringement suit once their application for registration has been approved — or rejected.<sup>4</sup> This has been especially controversial as the processing time for a copyright application may be many months, leading the Copyright Office, at Senator Tillis's instigation, to request comments on a possible deferral of the examination process until after registration in December of 2021.<sup>5</sup> In 2021 the Supreme Court again agreed to hear a case about copyright examination, this one about the standard for fraud on the copyright office.<sup>6</sup> The Court

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<sup>1</sup> See *Stephen E. Siwek, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2018 REPORT*, (2018), <http://www.iipa.org>.

<sup>2</sup> See *Patent Examination Data System*, UNITED STATES PATENT AND TRADEMARK OFFICE, <https://ped.uspto.gov/peds/#/> (last visited Sept. 19, 2022).

<sup>3</sup> See *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612, 621 (9th Cir. 2010) (“[T]he Register’s decision of whether or not to grant a registration certificate is largely perfunctory”); Susan M. Richey, *The Troubling Role of Federal Registration in Proving Intellectual Property Crimes*, 50 AM. CRIM. L. REV. 455, 465 (2013) (“[T]he Copyright Office adopts a cursory examination process and generally confines its inquiry to a determination of whether filing and deposit requirements have been met.”).

<sup>4</sup> See *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, 139 S. Ct. 881 (2019).

<sup>5</sup> *Deferred Registration Examination Study*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/policy/deferred-examination> (last visited Sept. 19, 2022). The office recommended against such a system by letter dated August 22, 2022.

<sup>6</sup> *Unicolors, Inc v. H&M Hennes & Mauritz, LP*, No. 20-915 (U.S. 2021).

held that where an applicant incorrectly indicates that all works were published in an application, the registration is not invalidated.<sup>7</sup>

Claims for copyright have been registered under federal law since 1790, and before that were registered under myriad state laws under the Articles of Confederation. For much of this time those administering copyright registration did not just register anything they were given, but they examined the material which was given to them for compliance with copyright law and procedure. Sometimes they would either request additional material and/or refuse to register the copyright outright.

Although copyright examination is as old as the Republic, and is a major part of today's copyright ecosystem, there has as of yet not been a full-length piece exploring copyright examination. This piece does exactly that, showing the present, past, and possible future of copyright examination. Section II is an introduction to copyright registration and examination as it exists today. Section III is the first full history of copyright examination practice, with attention to the development of the process from both a procedural and substantive perspective. This history is divided into five major eras, from the time immediately after the Revolutionary War until today. Interleaved with the historical discussion is a statistical examination of copyright examination through these periods. Section IV provides recommendations based on the previous sections for streamlining and improving the copyright examination process today.

This piece aims to demystify and explore the copyright examination process, by giving a history of copyright examination in the United States, and also providing substantial statistical evidence — never before available — on copyright examination and rejection through history, especially in the past sixty-five years, where statistics are generally available. Many of the sources used for this piece were either obscure or previously not publicly available at all, and the hope is that by making this information available, it will empower litigants, scholars, and the Copyright Office itself to think about copyright examination in a new way.

In analyzing copyright examination, two things stand out, which are themes through this piece. First, different types of creative works fare differently in copyright examination. More plainly, works of visual art are rejected at much higher rates than other types of works, and we should consider a registration process more focused on examining them. Second, copyright examination began as a category inquiry, looking to see if a work could fit into one of the categories of registrable works — or if a work was in one of the categories of works specifically excluded from copyright protection. Following the 1909 Copyright Act, especially after the Second World War, copyright examination shifted into being an inquiry into

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<sup>7</sup> *Unicolors, Inc v. H&M Hennes & Mauritz, LP*, 595 U.S. \_\_\_\_ (2022).

whether the work submitted for registration was copyrightable. This shift in what comprises copyright examination from form to substance has hereto not been remarked on, but it helps explain why some works were registered for copyright in the past which would not be registered today.

Given that this piece demonstrates that certain types of works are registered at extremely high rates, I propose that for works in these classes an application should instead require further disclosures from the applicant, including affirmation that the work does not have attributes which would generally lead to rejection. If the applicant is unable to make these affirmations the application would be examined, as before, by a human examiner. For certain classes — focused on artwork and visual arts — examination by a human examiner would still be required. This is because these classes have an extremely high rate of rejection relative to other classes. By automating some examination, resources could be focused where needed and the examination backlog could be effectively removed.

The most extensive work on the subject thus far has come from the Copyright Office, especially in Revision Studies 17 and 18 from 1958-1960, which are discussed below. The most extensive modern treatment of this issue thus far is in the “thumbnail sketch” of the issue William Patry provides in Appendix B to his treatise on Copyright Law.<sup>8</sup> Dan Burk has provided some discussion of the topic in his article *DNA Copyright in the Administrative State*, where Part IV is entitled “Characterizing the Copyright Office.”<sup>9</sup> Aaron Perzanowski has also studied the copyright office and argued that the Office should refocus on registration activity and refrain from extensive policy studies it has done more of as of late.<sup>10</sup> Likewise, Thomas Field has studied how U.S. Copyright Office decisions are regarded in litigation.<sup>11</sup> Susan Richey has argued that the cursory nature of copyright examination poses serious due process concerns for criminal copyright infringement defendants.<sup>12</sup> John Tehranian has observed that an opaque examination process serves the interests of major film studios, while individual writers are funnelled into less protective regimes like the

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<sup>8</sup> 8 WILLIAM F. PATRY, *PATRY ON COPYRIGHT*, App’x B § B1 (2022) (Indeed, Patry notes that “little has been written on” examination of claims for registration by the Copyright Office.).

<sup>9</sup> Dan Burk, *DNA Copyright in the Administrative State*, 51 U.C. DAVIS L. REV. 1297, 1318 (2018).

<sup>10</sup> Aaron Perzanowski, *The Limits of Copyright Office Expertise*, 33 BERKELEY TECH. L.J. 733, 776 (2018) (“[T]he Office should focus its efforts on its primary registration-related responsibilities for the time being.”).

<sup>11</sup> Thomas G. Field, Jr., *Judicial Review of Copyright Examination*, 44 IDEA 479 (2004).

<sup>12</sup> Richey, *supra* note 3.

WGA Script Library.<sup>13</sup> There were also a number of older works which offer historical context on copyright examination.<sup>14</sup> Also important historically, and discussed below, is E. Fulton Brylawski Jr.'s *Copyright Office: A Constitutional Confrontation* from the mid-70s.<sup>15</sup> However, the copyright examination process has not previously been subject to a full-length piece exploring its development and contours, which this piece aims to remedy.

## II. THE PRESENT OF COPYRIGHT EXAMINATION

Despite occasional calls for its abolition, discussed below, copyright registration has endured in the United States to this day, and examination of applications for copyright has endured alongside it.<sup>16</sup> Examination has both a procedural and substantive element in the United States, where procedural examination is checking for compliance with the filing requirement, and substantive examination is checking for compliance with copyright law more generally. In this piece particular attention is paid to substantive examination, and when examination is referred to, it means substantive examination unless specified otherwise.

### A. The Purpose of Examination

Under current law, copyright protection exists once a work is “fixed in any tangible medium of expression” — in other words is written down or otherwise recorded.<sup>17</sup> Copyright registration in the United States is not mandatory for copyright protection, but registration carries with it numerous benefits, especially for domestic creators, who are required to register prior to filing a lawsuit for copyright infringement.<sup>18</sup> Likewise valuable is the ability to recover statutory damages of up to \$150,000 per intentional infringement, especially useful given the difficulty of calculating the economic harm caused by such infringements.<sup>19</sup> Also important is that regis-

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<sup>13</sup> John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399 (2009).

<sup>14</sup> *The Role of the Register of Copyrights in the Registration Process: A Critical Appraisal of Certain Exclusionary Regulations*, 116 U. PENN. L. REV. 1380 (1968); see also 16 BULL. COPYRIGHT SOC'Y 65 (1968).

<sup>15</sup> E. Fulton Brylawski Jr., *The Copyright Office: A Constitutional Confrontation*, 44 GEO. WASH. L. REV. 1 (1975).

<sup>16</sup> 17 U.S.C. §§ 408, 410.

<sup>17</sup> *Id.* § 102.

<sup>18</sup> See U.S. COPYRIGHT OFFICE COPYRIGHT BASICS 5, <https://www.copyright.gov/circs/circ01.pdf>; see also Robert J. Kasunic, *The Benefits of Registration*, 68 J. COPYRIGHT SOC'Y 83 (2021) (exploring the copyright registration process in detail).

<sup>19</sup> *Id.*

tration is a key step towards the seizure of infringing goods by Customs and Border Patrol.<sup>20</sup>

These all stem from the most fundamental benefit of a copyright registration in the United States — the presumption of validity if registration was promptly filed.<sup>21</sup> This is not simply a presumption that the right forms were filled out, but rather that the registration complies with the “proper subjects for copyright protection, that the statutory formalities of registration have been satisfied, and that the plaintiff is the owner of the copyright.”<sup>22</sup> While the validity of a registered copyright can still be challenged, a timely registration creates a “rebuttable presumption that [a] copyright is valid.”<sup>23</sup> The burden is on the defendant to show that a registered copyright is invalid.<sup>24</sup>

This rebuttable presumption of validity is hardly insurmountable for a defendant with a legitimate attack on the copyrightability of the work. At the same time, giving a presumption of validity to a copyright registration without an examination of the work’s copyrightability is an obviously problematic move. As mentioned above, Susan Richey has argued that “[c]ast against the minimal examination that gives rise to registrations in the Copyright Office, application of a presumption of copyright validity in criminal proceedings is particularly troubling.”<sup>25</sup> Further, asymmetries in who pursues copyright registration (as opposed to relying on automatic protection) are put into stark relief given the presumption of validity.<sup>26</sup> Accordingly, examination is vital to ensure that the copyright registration

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<sup>20</sup> 19 C.F.R. § 133.31 Recordation of copyrighted works.

<sup>21</sup> 17 U.S.C. § 410(c) (“In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.”) The presumption of validity was a new feature of the 1976 Act; section 209 of the 1909 Act simply stated that the registration certificate was “prima facie evidence of the facts stated therein.” The original draft of the 1976 Act kept the limited presumption of the 1909 Act, but the broader presumption was adopted following the suggestion from the MPAA that “the presumptions should be built up” to balance the new limitation of years after publication. Testimony of Edward Sargoy, Copyright Committee, Motion Picture Association of America, REPORT OF THE REGISTER OF COPYRIGHT ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW, Pt. 2, 357 (Comm. Print 1961), <https://babel.hathitrust.org/cgi/pt?id=MDp.35112100697905&view=1up&seq=371&skin=2021>.

<sup>22</sup> *Midway Mfg. Co. v. Dirkschneider*, 571 F. Supp. 282, 284 (D. Neb. 1983).

<sup>23</sup> *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1233 (11th Cir. 2010).

<sup>24</sup> *Id.*

<sup>25</sup> Richey, *supra* note 3, at 483.

<sup>26</sup> Tehranian, *supra* note 13; see also Miriam Marcowitz-Bitton & Emily Michiko Morris, *The Distributive Effects of IP Registration*, 23 STAN. TECH. L. REV. 306, 369 (2020).

system and its benefits inure to creators and society, and not solely to entrenched interests.

*B. The Methods of Examination*

Applying for copyright registration involves payment of the fee, completion of the registration application, and submission of deposit material.<sup>27</sup> Nowadays this is usually done electronically, in full or part, but the option to file on paper remains.<sup>28</sup> Once the application is submitted it will be evaluated by a Registration Specialist, the modern nomenclature for a copyright examiner.<sup>29</sup> Registration Specialists undergo a year of training,<sup>30</sup> and there are approximately 125 of them examining claims for copyright registration.<sup>31</sup> Copyright examination typically consists of the registration specialist making the determination that (1) the application is facially acceptable, (2) the subject matter of the application is copyrightable, and (3) the deposit and other submitted material and corresponds to the information in the application.<sup>32</sup> The Copyright Office has never checked for independent creation or prior art as the Patent Office does — the Copyright Office lacks the resources to do so, and even if it could such an inquiry would almost certainly be porous.<sup>33</sup> Lying or plagiarism via copyright registration is a federal crime that can be prosecuted,<sup>34</sup> so there is an obvious disincentive to submit work that is not one's own, but this distant threat is the only disincentive aside from the ineffectiveness of the registration if discovered. The Registration Specialist may request additional documentation or information in the course of the examination process, and if the registrant does not comply the application may be considered abandoned or rejected.

If the Registration Specialist accepts the registration, no more needs to be done. However, if the application is rejected, an applicant may request reconsideration by a Registration Program staff attorney, who will

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<sup>27</sup> JAMES E. HAWES & BERNARD C. DIETZ, *COPYRIGHT REGISTRATION PRACTICE* § 4:25 (2021).

<sup>28</sup> *Id.* § 4:14.

<sup>29</sup> *Id.* § 4:25.

<sup>30</sup> Alison Hall, *The Life of a New Registration Specialist*, LIBRARY OF CONGRESS BLOG (June 3, 2019), [https://blogs.loc.gov/copyright/2019/06/day\\_in\\_the\\_life\\_registration\\_specialist](https://blogs.loc.gov/copyright/2019/06/day_in_the_life_registration_specialist).

<sup>31</sup> Kasunic, *supra* note 17 at 89 (The head of the Registration Policy and Procedure section of the Copyright Office, Kasunic notes that the number of examiners had dropped to only 75, but numbers had since been restored.)

<sup>32</sup> Hawes and Dietz, *supra* note 25, § 4:25.

<sup>33</sup> *Id.*; see also *Midway Mfg. Co. v. Bandai-Am., Inc.*, 546 F. Supp. 125, 143 (D.N.J. 1982).

<sup>34</sup> 17 U.S.C. § 506(e).

either reverse the rejection or affirm it — and explain why in writing.<sup>35</sup> This may then be appealed to the Copyright Office Review Board, which will likewise make its determination in writing.<sup>36</sup> Should an applicant wish to further challenge this, the next step is to sue the Register of Copyrights for mandamus in federal court.<sup>37</sup>

Examination at the Copyright Office is guided by the *Compendium of U.S. Copyright Office Practices* (the “*Compendium*”), currently in its third edition.<sup>38</sup> The *Compendium* is both a procedural manual and something of a treatise on the scope of copyright law, and gives some degree of predictability and openness to copyright examination. Also helpful for our purposes, the *Compendium* contains a diagram showing the modern flow of an application very concisely, and I’ve reproduced it here.<sup>39</sup>

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<sup>35</sup> Nicole Pottinger & Brian L. Frye, *Registration is Fundamental*, 8 IP THEORY 1, 5 (2018), <https://www.repository.law.indiana.edu/ipt/vol8/iss1/1>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Nowadays, an application which is rejected is also sufficient to bring suit — this was not the case prior to the 1976 Act.

<sup>38</sup> U.S. COPYRIGHT OFFICE, *COMPENDIUM OF U.S. COPYRIGHT PRACTICES* § 101 (3d ed. 2021).

<sup>39</sup> *Id.* Ch. 213.



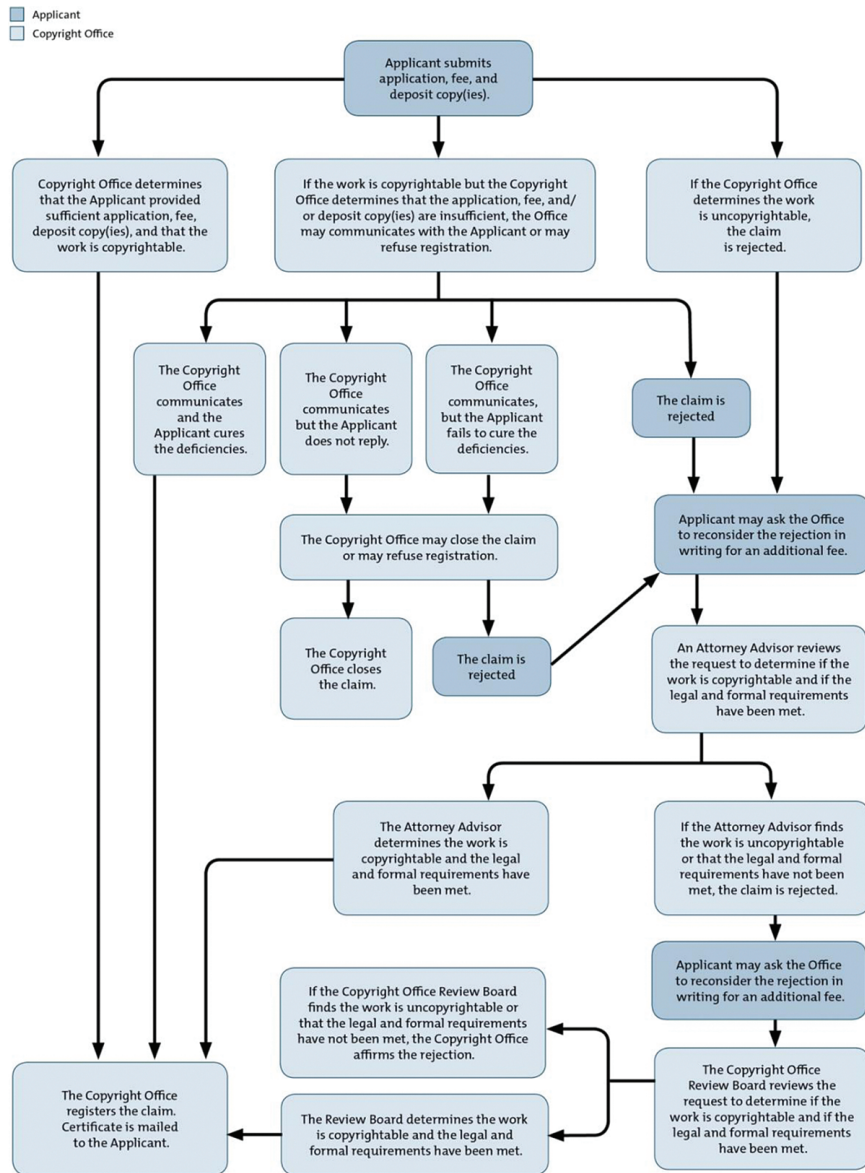


Figure 1 - The Registration Policy at a Glance, from Compendium

In practice, copyright examination consists of a check of the application materials and a legal determination as to whether the work being registered is protectable by copyright law. However, this was not always the case.

### III. THE PAST OF COPYRIGHT EXAMINATION

Copyright examination has been done throughout the history of the United States, but there has been scant attention paid to its historical development. This section aims to remedy that, by tracing copyright from the era of the Articles of Confederation, followed by the period until 1870 when copyright registration was handled by the federal courts, to the move of copyright to the Library of Congress, the creation of a discrete Copyright Office, and successive revisions of copyright law which changed the place of examination within the structure of copyright law.

#### A. 1781-1790 – State Copyright Laws

The colonies were not permitted to enact copyright systems, and colonists were ineligible for crown copyright, thus the period until the end of the revolutionary war saw no copyright examination activity in the nascent United States.<sup>40</sup> With the end of the Revolutionary War in 1781, the progress of building a new nation began, and Noah Webster and a number of other authors and other creators began crisscrossing the states lobbying for state copyright laws, and received such laws in all states except Delaware.<sup>41</sup>

The records of state copyright under the Articles of Confederation are incomplete, with a number of researchers finding caches of records, but other state records being presumed lost.<sup>42</sup> Connecticut was among the most active states for state copyright, and in its records, I believe I've found at least one example of registration being denied. On August 10, 1784, Josiah Sherman attempted to register a work for copyright with George Wyllys, the Connecticut Secretary of State.<sup>43</sup> No title is listed for

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<sup>40</sup> Nora Slommsky, *To Save the Benefit of the Act of Parliament: Mapping an Early American Copyright*, 40 *LAW & HIST. REV.* 625, 629 (2022).

<sup>41</sup> G. Thomas Tanselle, *Copyright Records and the Bibliographer*, in *STUDIES IN BIBLIOGRAPHY: PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF THE UNIVERSITY OF VIRGINIA* 77, 77-124 (Univ. of Virginia Library 1979), <http://xtf.lib.virginia.edu/xtf/view?docId=StudiesInBiblio/uvaBook/tei/sibv022.xml;chunk.id=vol022.02.02;toc.depth=1;toc.id=vol022.02;brand=default>. I was unable to find a reason why Delaware did not pass a copyright law in this period. This is especially peculiar since Delaware did grant patents during this period. Christopher Beauchamp, *Oliver Evans and the Framing of American Patent Law*, 71 *CASE W. RESERVE L. REV.* 445, 451 (2022)

<sup>42</sup> *Id.*; see also Earle E. Coleman, *Copyright Deposit at Harvard*, 10 *HARV. LIBR. BULL.* 135 (1956).

<sup>43</sup> The Connecticut government never dissolved and reformed pursuant to the Revolution, and thus Wyllys was then forty-nine years into a seemingly impossible sixty-one year term as Secretary of State, spanning 1735-1796. This George Wyllys should not be confused with his ancestor of the same name, who was governor of Connecticut in the 1640s.

the work, but it seems likely it was his controversial sermon “God In No Sense The Author of Sin.”<sup>44</sup> This thirty-page sermon is substantially shorter than the full monographs or other works which were successfully registered for copyright with Wyllys. The Connecticut copyright law granted protection to both books and pamphlets though, so the registration likely wasn’t refused on that ground.<sup>45</sup> Whatever the reason, this incomplete registration is the first suggestion in America that copyright registration would not just be rubber stamped. It would be many years before another I could find.

*B. 1790-1870 – Era of Confusion*

The U.S. Constitution includes a clause giving Congress the power to establish laws for copyright, and in 1790 Congress did just that, passing a copyright law in the second session of the first Congress based heavily on England’s Statute of Anne from 1710. Under this law, which would remain largely unchanged for purposes of examination until 1870, the author or proprietor of a work would register, pay a fee and deposit a printed title page with the clerk of the local United States district court, comply with the notice provisions of the law, publish the work, and then deposit the required copies after publication. However, there is no evidence that I’ve found of a copyright registration being denied in the early republic. The clerks of the individual federal district courts were the instruments of copyright registration and from the evidence they registered most anything that was given to them, even if not explicitly authorized by the statute.<sup>46</sup> Music was not explicitly included as a category of copyrightable subject matter until 1831 for instance, but it was being registered for copyright before 1800.<sup>47</sup> However, as the nation matured courts would begin to

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<sup>44</sup> Special thanks to Nora Slonimsky for this insight.

<sup>45</sup> An Act for the Encouragement of Literature and Genius, 1783 Conn. Acts 133.

<sup>46</sup> It isn’t clear why the District Court Clerks were the instruments of copyright registration under the 1790 Act. That law’s legislative history is somewhat obscure, and the predecessor bill, H.R. 10 from the first session, only survives as a typescript of a typescript. In H.R. 10, the place of registry is left blank, suggesting they weren’t sure where it would be. *Joint Copyright Patent Bill [H.R. 10]*, *New York (1789)*, in *PRIMARY SOURCES ON COPYRIGHT 2* (Lionel Bently & M. Kretschmer ed., 2008) [https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=Record\\_us\\_1789c](https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=Record_us_1789c). The District Court clerks may well have been the only place they could think of.

<sup>47</sup> KEVIN PARKS, *MUSIC & COPYRIGHT IN AMERICA: TOWARDS THE CELESTIAL JUKEBOX 4* (Am. Bar Ass’n, Section of Intell. Prop. L. Chi., Ill. 2012).

clarify what was not eligible for copyright protection, and some clerks would feel duty-bound to enforce these rulings.<sup>48</sup>

The major copyrightability question of the era was protection for product labels, and in 1849 Justice McLean, riding circuit in Ohio, held that a label for a bottle of medicine without ornamentation or features was not copyrightable.<sup>49</sup> A few years later, the clerk for the Northern District of New York, one Aurelian Conkling, wrote an open letter saying that although he would continue to register labels as copyrights since his duties were ministerial, he felt that labels could not be copyrighted.<sup>50</sup> He also wrote the Secretary of State, who issued a Circular dated April 11, 1856, directing clerks that “inasmuch as mere labels are not comprehended within the meaning of said act,” the clerks of the district courts were ordered to refuse registration to labels.<sup>51</sup>

In 1859 copyright responsibilities were moved to the Interior Department, which delegated them to the Patent Office (registrations remained the responsibility of the clerks of the district court).<sup>52</sup> Shortly after this act was put into effect the Patent Office put out a circular to the same effect as the State Department circular a few years earlier, specifically directing the District Courts not to register “stamps, labels, and other trade-marks

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<sup>48</sup> The discussion regarding product labels, here and subsequently for registration in the Patent Office 1874-1940, originally appeared in part in Zvi S. Rosen, *Reimagining Bleistein: Copyright for Advertisements in Historical Perspective*, 59 J. COPYRIGHT SOC'Y 347 (2012).

<sup>49</sup> See *Scoville v. Toland*, 21 Fed. Cas. 863 (C.C.D. Ohio 1848) (No. 12,553). Justice McLean held similarly in another case, but there he simply assumed that labels were not copyrightable but did not explain why. See *Coffeen v. Brunton*, 5 F. Cas. 1184 (C.C.D. Ind. 1849) ((No. 2,946). There is also an unreported case in the Circuit Court at New York during 1855 in which one party sued another for violating his copyright in a label containing directions. The Circuit Court denied the motion for a preliminary injunction by the plaintiff, and the case was stayed and then dismissed consensually. *John B. Wells v. William Taylor*, N.Y. TIMES, Oct. 15, 1855, at 3 (citing *John B. Wells & Stephen H. Provost v. William Taylor and Charles Hodgetts*, Equity Case No. 1-449 (C.C.S.D.N.Y. 1855)).

<sup>50</sup> *Editorial and Miscellanea*, 16 N.Y. J. MED. & COLLATERAL SCI. 421, 423 (May 1856).

<sup>51</sup> *Quack Medicine Labels Not Patentable*, 4 AM. J. PHARMACY 377 (Jul 1856). While the circular seems to predate the *N.Y. Journal of Medicine* article, the correspondence that led to the circular occurred before its publication. It seems that journalists confusing copyrights and patents is an American tradition. Jonathan Bailey, *Why It's Not OK for Journalists to get Intellectual Property Law Wrong*, PLAGIARISM TODAY (Feb. 19, 2013), <https://www.plagiarismtoday.com/2013/02/19/why-its-not-ok-for-journalists-to-get-intellectual-property-law-wrong>.

<sup>52</sup> Act of February 5, 1859, 35th Cong., 2d Sess., 11 Stat. 380. For thirteen years previously, deposit had been required at both the Smithsonian and Library of Congress, but the 1859 Act reversed that. Act of August 10, 1846, 29th Cong., 1st Sess., 9 Stat. 106.

of any manufactured articles, goods, or merchandise” because “the acts of Congress relating to copyright are designed to promote the acquisition and diffusion of knowledge, and to encourage the production and publication of works of art,” and thus labels were not “embraced within the meaning of the [copyright] acts.”<sup>53</sup> Thus a label, no matter how artful, could not be registered as copyright, but might be registered as a design patent.<sup>54</sup>

And yet, it does not seem that much changed. In the 1860s, a successor as clerk of the District Court for the Northern District of New York complained that he was getting repeated requests to register labels, and that a common complaint was that the Southern District of New York was willing to issue copyright registrations for product labels.<sup>55</sup> In response, in 1866 the Commissioner of Patents issued a circular reiterating the 1859 circular, and making clear that product labels were not subject to copyright protection and should not be registered.<sup>56</sup> There is no evidence this was followed.

In 2020 the Library of Congress released scans of the title pages deposited for copyright with the District Courts for 1790-1870.<sup>57</sup> These scans show that essentially no examination was being done by the clerks of some of the busiest courts for copyright registration into the 1860s. For instance, at the Southern District of New York in Manhattan, works created and printed in the United Kingdom were being registered, in obvious contravention of the lack of copyright protection for foreign works, which remained the law until 1891.<sup>58</sup> Likewise, in both Massachusetts<sup>59</sup> and New

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<sup>53</sup> *The Law of Copyright*, N.Y. TIMES, July 25, 1859, at 5.

<sup>54</sup> *Labels Not the Subject of Copyright*, BALT. SUN, Aug. 27, 1859. Apparently at the time a patent cost \$15 and gave seven years protection, while a copyright cost 50¢ and gave twenty-eight years protection, leading some to figure a copyright was a better protection. *Patents and Copyrights*, N.Y. TRIB., Oct 8, 1859, at 5.

<sup>55</sup> Zvi S. Rosen, *Product Labels and the Origins of Copyright Examination*, (MOSTLY) IP HISTORY (May 23, 2017), <http://www.zvirosen.com/2017/05/23/product-labels-and-the-origins-of-copyright-examination>.

<sup>56</sup> DEP’T OF THE INTERIOR, U.S. PATENT OFFICE, CIRCULAR OF FEBRUARY 15, 1866, <http://www.zvirosen.com/wp-content/uploads/2017/05/1866-Copyright-Circular.pdf>.

<sup>57</sup> *Collection: Early Copyright Records Collection, 1790 to 1870*, LIBRARY OF CONGRESS, <https://www.loc.gov/collections/early-copyright-materials-of-the-united-states>.

<sup>58</sup> THE LIVERPOOL COMMERCIAL LIST 1867–1868, in *Copyright Title Pages*, <https://www.loc.gov/resource/rbccpmat.copy0042/?sp=116> (last visited Jan. 5, 2023). I am not aware of anyone noticing this before, and don’t know how widespread this practice was, but it seems significant given that a lack of international copyright reciprocity, mostly with the United Kingdom, was by far the biggest issue in copyright policy in the nineteenth century America.

<sup>59</sup> *Id.* at Image 101, <https://www.loc.gov/resource/rbccpmat.copy0050/?sp=101>. The machine was also protected by a utility patent: U.S. Patent No. 87,523A (is-

Jersey,<sup>60</sup> clerks were happy to register technical drawings and photographs clearly meant to protect the machine depicted as an invention, rather than the graphical work itself.

Seeing as how in most Courts the clerks would register whatever was given to them, it's worth asking why. One possibility is simply money — the clerks kept fees collected as salary, and one reported case shows that 18.85% of the clerk's salary was copyright fees.<sup>61</sup> The Judges of the District Court had essentially complete latitude to hire and fire whoever they liked, and it's clear that there was a fair bit of nepotism involved.<sup>62</sup> In the early years of the federal courts clerks kept all fees as salary, leading to situations where the clerks would sometimes make more than the judges.<sup>63</sup> Financial reporting requirements were nonexistent — it was not until 1839, in the wake of the defalcation of over a million dollars of federal government funds by Samuel Swartwout, that Congress required clerks to keep a record of money received and to transmit it to Congress.<sup>64</sup> Laws passed in 1841 and 1842 for the first time capped the fees retained by clerks of the District Courts at \$3,500 annually, a fairly high amount at the

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sued Mar. 2, 1869), and design patent: U.S. Patent No. 3,399S (issued Mar. 2, 1869).

<sup>60</sup> Reuben Hoggett, 1869 – “*Steam King*” *Steam Man – Winans/Eno – (American)*, CYBERNETICZOO.COM (Oct. 7, 2009, 12:19 AM), <http://cyberneticzoo.com/steammen/1868-steam-man-eno-american>.

<sup>61</sup> *United States v. Bassett*, 24 F. Cas. 1030 (C.C.D.Mass. 1843) (No. 14,539). Bassett somewhat unusually held the offices of clerk for both the district and circuit courts and following the imposition of limits on both offices successfully argued that he could collect the maximum from each office separately. The 18.85% figure includes only fees collected as district court clerk, if one includes circuit court fees the number would drop to 12.7%, but the two offices were frequently not held by the same person.

<sup>62</sup> *Ex Parte Duncan N. Hennen*, 38 U.S. 225 (1839). A substantial number of court clerks were identified as being children of judges in a 1852 report, which clearly had some concern about the phenomenon. Fees and Expenses of the Courts of the United States, Letter from the Secretary of the Interior, 32nd Cong., 1st Sess., H. EXEC. DOC. 32, at 9 (1852). However, not every Judge's son was unequal to the task. For instance, Aurelian Conkling, who we have just discussed as being unusually conscientious at the Northern District of New York, is mentioned as being son of a district judge.

<sup>63</sup> Scott L. Messinger, *Order in the Courts: A History of the Federal Court Clerk's Office*, FED. JUD. CTR. (2002), <https://www.fjc.gov/content/order-courts-history-federal-court-clerks-office-0>.

<sup>64</sup> *Id.* Because clerks were not required to remit funds to the federal treasury until then they were not accused of any such defalcations (a defalcation being failure to account for funds held for another). However, circa 1817 a clerk in New York was accused of embezzlement for taking litigation trust funds.

time,<sup>65</sup> but unless the clerk would make more than that in fees (unlikely, except perhaps in the busiest jurisdictions) a strong incentive remained to accept registrations. It would not be until 1919 that the office of the clerks of federal courts became a salaried position,<sup>66</sup> almost fifty years after copyright registration stopped being the purview of the district court clerks.

### C. 1870-1909 – Era of Transition

Following the better part of a decade of lobbying by the Librarian of Congress,<sup>67</sup> all responsibilities of copyright registration were transferred to the Library of Congress as part of an omnibus revision of all federal intellectual property laws in 1870. This new law also enumerated many types of visual art to the list of works protected by copyright, in addition to engravings and prints, which had been included since 1831 and 1802, respectively. Although the Librarian presumably understood that some examination would be involved with this responsibility, it was clear throughout that it was a distraction from his main interest in growing the Library of Congress into a great national library, with copyright deposit being the instrument of that end. During these 27 years, examination of most copyright registrations, to the extent it was conducted at all, was done by the Librarian of Congress. During this era both the Librarian of Congress and Courts made explicit statements that no examination was done, but there are a string of anecdotes of applications for copyright not being accepted on substantive grounds which belie that contention. For instance, when the Librarian of Congress received an application to register a commercial print or label they would not be registered, and instead they would forward the application on to the Patent Office.<sup>68</sup> What becomes clear from this era is that the content of works was not examined, but rather works were rejected if they were not in a set of categories of works for which copyright was permitted by statute.

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<sup>65</sup> *Id.* Clerks of the Circuit Courts could keep up to \$2,500 annually and given that many men held both offices the income could be considerable, as Francis Bassett doubtless realized, *supra*.

<sup>66</sup> *Id.*

<sup>67</sup> John Young Cole, Jr., Ainsworth Spofford and the 'National Library,' (Sept. 30, 1971) (Ph.D. dissertation, George Washington University) (ProQuest).

<sup>68</sup> Twenty years after the Act's passage, people still attempted to register labels as copyrights with the Library of Congress with at least some regularity. Julian Hawthorne, *The Librarian Among His Books*, 53 LIPPINCOTT'S MONTHLY MAG. 517, 519 (1894). While most types of works would only include a title page, for a single-sheet item like a label the Librarian would receive the label itself.

### 1. Examination of Copyrights by the Librarian of Congress

Although the 1870 Act changed the venue for copyright registration, it did not otherwise substantially modify the copyright registration process, and accordingly it would have been difficult to conduct a proper examination. The registration process continued to require submission of a printed title page coupled with payment of the fee; the Librarian would only see the complete work for which copyright protection had been achieved when it was deposited to perfect the registration, thus it would be effectively “impossible for the Librarian of Congress to determine whether or not” the thus far unpublished work was copyrightable.”<sup>69</sup> Given these constraints, it is not surprising that the broad rule under Librarian Ainsworth Spofford, whose tenure lasted from 1865 to 1896, was that essentially anything could be registered for copyright. In 1895 he was quoted as saying that ““if he were applied to copyright the Bible, he would have no option but to do so, and, in fact, had done so in several instances, though he knew such copyrights would be invalid.”<sup>70</sup> In that same article it is estimated that 75% of copyright registrations made during the period would not pass muster in a court of law.<sup>71</sup> It also seems likely that even if he wanted to do more substantive examination the workforce at the Library of Congress would have been insufficient.<sup>72</sup>

In a form letter which was meant to be sent to applicants, the Librarian explained this lack of substantive examination in more detail, noting that he had “no discretion or authority to refuse any application for a copyright coming within the provisions of the law, and all questions as to pri-

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<sup>69</sup> Letter from Wallace A. Bartlett, Attorney for W.L. Mason & Co, to Librarian of Congress (June 24, 1897).

<sup>70</sup> *Spofford Is on the Rack*, N.Y. TIMES (July 11, 1895), <https://timesmachine.nytimes.com/timesmachine/1895/07/11/103368391.html?pageNumber=4>.

<sup>71</sup> *Id.*

<sup>72</sup> The *New York Times* was covering copyright examination because one of the major issues in a lawsuit involving alleged infringement of the *Encyclopedia Britannica* was that a deposit that had to be entered within ten days of publication was entered eleven days after publication, but was backdated to the tenth day. *Librarian Spofford's Record*, N.Y. TIMES (Dec. 20, 1891), <https://timesmachine.nytimes.com/timesmachine/1891/12/20/103358082.html?pageNumber=2>. At trial “evidence [was presented] that the librarian’s office was greatly crowded with work, and that his force of clerks was insufficient, and that sometimes books received for copyright purposes were not stamped until the day after their receipt.” *Black v. Henry G. Allen Co.*, 56 F. 764, 766 (C.C.S.D.N.Y. 1893) (reporter’s headnote). This litigation dragged on for a number of years; earlier decisions from the case can be found at 42 F. 618 (2d Cir. 1890) and 43 F. 680 ((C.C.S.D.N.Y. 1890). The issue of date-keeping for submissions to the Copyright Office remain a current one. *Copyright Office Adopts “Mailbox” Rule for Appeals to Refusals to Register*, COPYRIGHT.GOV (2016), <https://www.copyright.gov/rulemaking/refusals-to-register>.



ority or infringement are purely judicial questions.”<sup>73</sup> However, other such form letters from the same period were meant to be enclosed with refusals to register handwritten title pages,<sup>74</sup> as well as prints or labels under the act of 1874.<sup>75</sup> These were some of the form responses prepared for the Librarian, who opened all mail himself. As Spofford explained in an 1894 interview,

[e]xperience has enabled me to classify the various requests that are made here, and I have a blank form printed to meet the most of them. There are thirty-seven in all. As I glance through the letters on my desk, one after the other, I mark them with blue pencil with a particular mark according to the blank form by which it is to be answered. Then, of course, the dollars which the applicants for impossible copyrights have enclosed have to be sent back to them.<sup>76</sup>

In other words, Spofford was doing a cursory examination of the letters seeking entry of a title for copyright, where he would make a spot determination if the work was generally eligible for copyright or whether it fit into one of the proscribed categories. Thus, a book would be registered for copyright even if the text was entirely in the public domain, but a book of forms would be rejected as being one of the types of work not eligible for registration following the Supreme Court’s decision in *Baker v. Selden*.<sup>77</sup> However, enforcement was at best uneven, even for blank forms. For instance, in 1894 an accountant from Buffalo named William Mowat successfully received a copyright registration for a “Progressive monthly statement.”<sup>78</sup> The following year he applied to register “Mowat’s Accounting System Rent Book” and an accompanying “Rent Register,”

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<sup>73</sup> Circular sent to Union Chart Company by Ainsworth Spofford, Librarian of Congress, Nov. 7, 1873, in Box 4 of LC Landover Copyright Materials. Spofford added in handwriting that “Copyrights are not like Patents where fees are large and provide for examination as to priority and originality, all claims for copyright are recorded without examination, as of right.”

<sup>74</sup> Circular sent to I.A. Elliot, Centerville, IA, by ARS, Nov. 17, 1873. The circular advises that the Librarian is “not at liberty to record or issue certificates of Copyright upon written titles. The law explicitly requires a printed copy of the title of the book, or other article for which a Copyright is desired to be sent to this office before the author or proprietor can be titled to receive a Copyright. The particular form or style of type is immaterial, it being necessary to print only the precise words of the title.”

<sup>75</sup> Printed Circular dated July 10, 1874, from A.R. Spofford. For much more on the 1874 Act, which moved copyright registration for commercial prints and labels to the Patent Office, please see *Reimagining Bleistein* by the author.

<sup>76</sup> Hawthorne, *supra* note 68, at 519-20.

<sup>77</sup> 101 U.S. 99 (1880).

<sup>78</sup> Copyright Registration No. 41563Z (1894).

but no registration record exists for either work — indicating the application was rejected.<sup>79</sup>

A few other anecdotes reinforce the understanding that examination was based on categories, rather than content, where the Librarian would determine the category of the work, based on the deposit, and determine if it fit into one of the existing categories of protectable works. For instance, in 1893 Spofford's cousin wrote him a letter asking him to reconsider the rejection of a theatrical pantomime on the grounds that it was “not copyrightable.”<sup>80</sup> The work is described as being by a Laura Hills, and entitled “The Pageant, a Year,” consisting “a series of gay pantomime scenes, for each month.”<sup>81</sup> This cousin argued that the work is really closer to a ballet or play and should be registrable as such, but there is no record of such a registration ever being made in the Copyright Card Catalog. In other words, the pantomime had been rejected as not fitting into one of the established categories of registrable works, and they were arguing, apparently unsuccessfully, that it could fit into an established category.

Only a year prior the famed modern dancer Loïe Fuller attempted to register her “Serpentine Dance” with the Library.<sup>82</sup> However, Spofford refused to register the Serpentine dance “for the reason that it does not come within the designation of any of the articles which are lawful subjects of Copyright.”<sup>83</sup> Because abstract dance did not fit into any of the established categories of copyrightable works, it could not be registered.<sup>84</sup> Although Fuller's attorneys contested the Librarian's authority to make this determination, asserting that “[t]he Librarian of Congress is not a judicial officer” and further that the dance in question could qualify as a dramatic composition, a Court decision finding abstract choreography was unpro-

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<sup>79</sup> Letter from William Mowat to Ainsworth Spofford, Librarian of Congress (Apr. 22, 1895).

<sup>80</sup> Letter from Cousin Hal or Har to Ainsworth Spofford (Jan. 15, 1893) in Ainsworth Spofford Papers, Library of Congress. The address is given as 323 Beacon Street in Boston, which matches an address Harriet Prescott Spofford was using by 1895, strongly suggesting the letter was from her. She was not literally the Librarian's cousin but rather his cousin's widow. *Harriet Elizabeth Prescott Spofford*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Harriet\\_Elizabeth\\_Prescott\\_Spofford](https://en.wikipedia.org/wiki/Harriet_Elizabeth_Prescott_Spofford) (last edited Sept. 24, 2022,). Thanks to Claudy Op den Kamp for suggesting that it could be from Harriet.

<sup>81</sup> *Id.*

<sup>82</sup> ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE 67 (2015).

<sup>83</sup> *Id.* at 71.

<sup>84</sup> Letter from A.R. Spofford, Librarian of Congress, to Henry Britton Gray (May 27, 1892), in Fuller v. Bemis Casefile, <https://archive.org/details/fullervbemis>.

tectible under the 1870 Copyright Act mooted the question of the Librarian's authority to deny an application for registration.<sup>85</sup>

Another incident from the same year is also notable for the attention paid by the Librarian, showing registration in this period was not automatic in practice. In 1893, Thomas Edison and his photographer W.K.L. Dickson attempted to copyright a motion picture they had created.<sup>86</sup> Registration 44732Y indicates that different photos were deposited on August 16 and October 6, 1893, and the registration was only allowed upon receipt of the second photograph.<sup>87</sup> Whatever happened, clearly the Librarian of Congress refused to register based on the first filing, and presumably made clear what was needed to cure the defects in the application, at which point the registration was granted. This led to the procedure whereby a motion picture could be registered for copyright if it was sent as a "paper print," with a long reel of film printed to paper constituting a single photograph in the eyes of the law. In other words, the initial application did not conform to an existing type of copyrightable work, and could not be accepted until the deposit material did fit into an established category of copyrightable work.

Evidence of other rejections exists as well, for instance the developer of a board game entitled "Military Tactics" complaining that his application to register a plain grid as the board had been rejected, while more complex game boards had been registered.<sup>88</sup> The response of the Librarian does not survive, but later in 1895, Meech was successful in registering the *directions* for his game, suggesting he had been given counsel to do

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<sup>85</sup> KRAUT, *supra* note 82 at 72; Letter from Lewinson & Falk to Ainsworth Spofford, Librarian of Congress (May 28, 1892), Ex. B. to Affidavit of Isaac N. Falk, in Fuller v. Bemis Casefile. Fuller v. Bemis, 50 F. 926 (C. C. S. D. N. Y. 1892).

<sup>86</sup> This story is expanded on greatly in other places, including Claudy Op Den Camp's contribution *The Paper Print* to *A History of Intellectual Property in 50 OBJECTS* (2019), as well as in my blog post *Some Adventures in the origins of Motion Picture Copyright*, (MOSTLY) IP HISTORY (Mar. 29, 2020), <http://mostlyiphistory.com/2020/03/29/some-adventures-in-the-origins-of-motion-picture-copyright/>, as well as in other sources like Peter DeCherny, *Hollywood's Copyright Wars* (2013).

<sup>87</sup> Until 1900, registration numbers had a letter appended to indicate the year – 1894 was Z, 1895 was AA, and so forth. Cindy Op den Kamp recently discovered that the work registered in 1893 was in fact the "Blacksmith Scene" Wendy Maloney, "*The Big Bang*" of Cinema: *Library Researcher Finds First Copyrighted Film*, LIBRARY OF CONGRESS BLOGS (Oct. 18, 2022).

<sup>88</sup> Letter from Huntington Phelps Meech to Ainsworth Rand Spofford, Librarian of Congress, (Feb. 9, 1895) (Copyright Archives 1570). Mr. Meech seems to have been born in 1877, making him about eighteen at the time, perhaps giving some context to this exchange.

so.<sup>89</sup> In October of that year, the “P.E. Bureau” of Boston attempted to register its name for copyright, but the request was denied on the grounds that “a mere name. . . is not protected by the copyright laws,” as explained in the form letter sent in return.<sup>90</sup> Copyright examination was clearly happening, but it was ad hoc and uneven.

As mentioned earlier, the aim in bringing copyright to the library was to enrich its collections. However, in testimony near the end of his time as Librarian in 1896, Ainsworth Spofford stated that over three quarters of his time was spent on his role as de facto “register of copyrights,” which surely had not been his desire when he became Librarian.<sup>91</sup> These hearings would lead to the creation of a separate position as Register of Copyrights, but two decades earlier similar concerns about too much of the Librarian’s time being spent on copyright for product labels and advertising led to the first example of both statistics and case law of copyright rejections.<sup>92</sup>

## 2. *Copyright Examination in the Patent Office*

Although the 1870 transfer of copyright functions to the Library of Congress brought Ainsworth Spofford the books he wanted to build the Library’s collection,<sup>93</sup> it also brought a flood of product labels and advertisements, to Spofford’s consternation.<sup>94</sup> In 1874, a law was passed moving copyright registration for commercial prints and labels to the Patent

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<sup>89</sup> Registration 13518AA (1895). Games are registrable today, provided the artwork or instructions contain sufficient original expression. COMPENDIUM 3D, *supra* note 38, §618.8(A)(2).

<sup>90</sup> Letter from F.M. Haskell, Supt., P.E. Bureau, to A.R. Spofford, Librarian of Congress (Oct. 7, 1895); Form letter in response, Oct. 9, 1895, in Copyright Archives 206. Although not made clear by the name, this was the Protestant Employment Bureau, “which placed young Protestant girls as domestic servants in homes worried about hiring a Catholic.” MARGARET LAMBERTS BENDROTH, *FUNDAMENTALISTS IN THE CITY: CONFLICT AND DIVISION IN BOSTON’S CHURCHES, 1885-1950*, at 80 (2005).

<sup>91</sup> S. REP. NO. 1573 (1897), Condition of the Library of Congress, Statement of A.R. Spofford, 127 (1897) (containing a transcript of hearings held before the Joint Committee on the Library, held November 16 through December 7, 1896).

<sup>92</sup> It’s worth mentioning briefly the case of *Merrell v. Tice*, in which the U.S. Supreme Court set extremely strict rules for what would be acceptable evidence of the Librarian having registered and received deposit of a copyrighted work and refused to accept a copy of the registration from the record books as acceptable evidence. 104 U.S. 557 (1881). The only acceptable evidence would have been a certificate under seal. *Id.* at 561.

<sup>93</sup> 16 STAT. 198 (1870).

<sup>94</sup> Annual Report of Librarian of Congress, 1872, Misc. Doc. 13, 42d Cong., 3rd Sess. (1872).

Office.<sup>95</sup> This law was not repealed until 1940, and for this whole period the Patent Office was charged with registering commercial prints and labels “in conformity with” copyright law.<sup>96</sup> If product labels and commercial prints were sent to the Librarian of Congress (and later the Register of Copyrights) he would forward them to the Commissioner of Patents instead of registering them.<sup>97</sup> The shift to the Patent Office for these matters is a boon for historical research, as the opinions of the Commissioner regarding appeals of rejections were reported in print form in the Official Gazette of the Patent Office, and also collected into the bound Decisions of the Commissioner of Patents. The Patent Office also reported applications, allowing some statistical insight.

The Patent Office has had a practice of examining whatever application comes in, be it for a patent or a trademark. Under the new law the Patent Office began examining copyright applications for commercial prints and labels, with the examination being done by trademark examiners. The statistics show that examination was taken quite seriously by the Patent Office.<sup>98</sup>

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<sup>95</sup> Act of June 18, 1874, 43d Cong., 1st Sess., 18 Stat. 78 § 3. The stated rationale for the new law was that it was meant to allow the registration of labels that were not trademarks in the Patent Office instead of the Library of Congress, since they had nothing to do with works of art, and there was no place for them in the Library of Congress. 1 Cong. Rec. 4413 (June 1, 1874).

<sup>96</sup> 53 STAT. 1142 (1939).

<sup>97</sup> Zvi S. Rosen, *Reimagining Bleistein: Copyright for Advertisements in Historical Perspective*, 59 J. COPYRIGHT SOC'Y 347, 355 (2012). This section is based on that piece, although it expands on the examination aspects, while that piece contains greatly more material on the 1874 Act generally. An example of this can be found in the file for Patent Office Label Registration No. 141 for “Building Blocks,” where Spofford was initially sent a application for copyright registration but it was forwarded to the Patent Office. NATIONAL ARCHIVES CATALOG, <https://catalog.archives.gov/id/16962971>. The Patent Office requested a higher fee, which was received, and a registration was granted. *Id.*

<sup>98</sup> The overage in 1883 likely reflects a backlog from previous years.

Table 1- Labels at the Patent Office 1874-1890

Year	Applications	Registrations	Grant Rate
1874	221	151	68.33%
1875	566	313	55.30%
1876	650	402	61.85%
1877	632	392	62.03%
1878	700	492	70.29%
1879	576	355	61.63%
1880	375	184	49.07%
1881	363	202	55.65%
1882	532	304	57.14%
1883	834	906	108.63%
1884	812	513	63.18%
1885	728	391	53.71%
1886	792	378	47.73%
1887	686	380	55.39%
1888	729	327	44.86%
1889	828	319	38.53%
1890	875	304	34.74%

Many such denials were due to the law's requirement that the label being registered not be a trademark, doubtless in part to prevent individuals from taking advantage of the lower fee for label registration (\$6 for a label and \$25 for a trademark).<sup>99</sup> In one of the first decisions of the Commissioner of Patents regarding labels, the Commissioner upheld the decision of the examiner that there could be no election between trademark and label registration if the label was a trademark.<sup>100</sup>

<sup>99</sup> This was suggested by a contemporary practitioner in a letter to *Scientific American* in 1884. *Correspondance*, Sci. Am., Sept. 13, 1884, at 165.

<sup>100</sup> *Ex parte* Godillot, 6 O.G. 642 (Comm'r Patents, 1874). This decision also suggested that if a label even contained a trademark, it needed to be registered as a trademark and not a label, but the commissioner stated that this was not the case a year later. *Ex parte* Orcutt, 8 O.G. 277 (Comm'r Patents, 1875) (stating that the label in the Godillot was in reality just a trademark, whereas here it was a proper label where the trademark was only a small part of it).

Critics of the 1874 Act were skeptical of this practice of rigorous examination from the beginning,<sup>101</sup> and in 1881 the Supreme Court for the District of Columbia (the forerunner of today's U.S. Circuit Court of Appeals for the D.C. Circuit) held this approach invalid, and issued mandamus to the Commissioner of Patents to register an application it had denied on the grounds that the "label" was actually a trademark, because copyright registration is a "merely ministerial" task.<sup>102</sup> Two years later the same Court again issued mandamus to register an application for a label registration that had been denied.<sup>103</sup> This second case had a unique twist—the Commissioner of Patents argued that the label law was unconstitutional following the *Trade-Mark Cases*, but the Court held that this was not an appropriate argument for the Commissioner to make and declined to rule on it.<sup>104</sup> Instead, the Court asserted that there was no power to examine and reject copyright applications, noting (without citation) that:

The Librarian of Congress had no more right to refuse to record a print or label—on the ground that, in his opinion, it constituted a trademark—than a county clerk would have to refuse to record a deed on the ground that, in his opinion, it was not so drawn as to secure to the parties asking the record thereof the rights sought to be secured.

And we may say that, so far as we are aware, the Librarian of Congress never pretended to exercise any judicial powers in the registry of labels or prints, or of books or pictures.<sup>105</sup>

The Court continued that:

[i]f one deposits with the Librarian of Congress the title of a book, claiming that he owns it, and that he is a citizen of the United States, or that the thing which he calls a book is in reality a book, it is not for the Librarian to inquire into the truthfulness of these assertions, but he issues his receipt, receives the papers and fees submitted, and leaves the party to such relief as owing to the proceedings had before him, and his other statutory rights the law entitles him to enjoy.<sup>106</sup>

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<sup>101</sup> *New Law Concerning Copyrights for Labels*, SCI. AM., July 11, 1874, at 17.

<sup>102</sup> *United States, ex rel. Willcox & Gibbs Sewing Mach. Co., vs. E. M. Marble*, 1 MACKAY 284, 293 (D.C. Sup. Ct. 1881). There is no record the mandamus was complied with.

<sup>103</sup> *United States, ex rel. Schumacher & Ettlinger v. Marble*, 3 MACKAY 32 (D.C. Supp. 1883). This reversed the finding of the Commissioner of Patents that he had the power to reject a trademark being registered as a label. 22 O.G. 1291, 1882 DEC. COMM'R PAT. 15 (Oct. 2, 1882).

<sup>104</sup> *Id.* In the *Trade-Mark Cases*, 100 U.S. 82 (1879), the Supreme Court held the 1870 trademark act unconstitutional since a trademark is not a "writing" within the meaning of the Constitution. Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 ST. JOHN'S L. REV. 827 (2009).

<sup>105</sup> *Id.* at 44

<sup>106</sup> *Id.* at 45.

However, it does not seem that the Commissioner of Patents ever stopped examining labels for validity, as Table 1 suggests. *Scientific American* took issue with the Commissioner's recalcitrance in 1884, arguing that the Commissioner of Patents should not engage in examination — that there was no discretion regarding the registration of copyrights.<sup>107</sup> The Commissioner of Patents responded to the District of Columbia Supreme Court a month later, upholding an examiner's ruling regarding a different label less than a month later.<sup>108</sup> The Commissioner noted that the 1874 Act raised the fee for a label registration from \$1 to \$6, and specifically required that labels not be trademarks. He also noted the *Willcox* decision but argued it was not well-considered, and declined to follow it. Following this decision *Scientific American* took further “decided issue” with the Commissioner,<sup>109</sup> but the Commissioner's view nonetheless could not be easily challenged if mandamus failed to change underlying practices, and the practice of examination continued.

In 1891, the U.S. Supreme Court in *Higgins v. Keuffel* held a label registration invalid on Constitutional grounds, and effectively shut down print and label registration for most of a decade.<sup>110</sup> Afterwards, some commentators concluded that no label could be sufficiently artful to be a valid copyright,<sup>111</sup> and the Commissioner of Patents had declined to register a label solely on those grounds.<sup>112</sup> However, a year later the Commissioner clarified that a sufficiently artful label *would* be registered where the label “possess[es] just as much artistic excellence, and no more, as would entitle it to copyright in the office of the Librarian of Congress.<sup>113</sup> Rules adopted in 1893 made it extremely unlikely any label would qualify for registration,<sup>114</sup> but these were reversed in 1898,<sup>115</sup> and within a few years applications registrations were higher than ever.

In the twentieth century challenges to the discretion of the Commissioner of Patents would continue, but they would end rather differently.

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<sup>107</sup> *Labels as Subjects of Copyright*, SCI. AM., Aug. 9, 1884 at 80.

<sup>108</sup> *Ex parte Moodie*, 28 O.G. 1271 (Comm'r Patents, 1884). This was appealed, but in the *Regina* case, *infra* at note 119, at 115, the D.C. Supreme Court in 1902 noted that no opinion was issued, and the minute book showed the case was dismissed without evidence of argument.

<sup>109</sup> *Recent Decisions of the Commissioner of Patents Concerning Trade Marks and Labels*, SCI. AM., Oct. 18, 1884, at 240.

<sup>110</sup> 140 U.S. 428 (1891).

<sup>111</sup> *Labels Under the Copyright Law*, WASH. POST (Jan. 17, 1892) at 4.

<sup>112</sup> *Ex parte Eldredge*, 55 O.G. 1278 (Comm'r Patents, 1891).

<sup>113</sup> *Ex parte Palmer*, 58 O.G. 383 (Comm'r Patents, 1892); *Copyright on Labels*, DRUGGISTS CIRCULAR & CHEMICAL GAZ., Feb. 1 1892, at 26

<sup>114</sup> *New Bills for the Regulation of Print and Label Registration*, 78 SCI. AM. 242 (Apr. 16, 1898) (reporting on the bills and noting that the 1874 Act was essentially a “dead letter” at this point).

<sup>115</sup> *Ex parte Mahn*, 82 O.G. 1210 (1898).



In 1902 the Regina Music Box Company, the dominant maker of music boxes,<sup>116</sup> attempted to register a decorative label that simply said “Regina.” The examiner refused to register the label, on the grounds that a label needed to be descriptive of the product, and a label that simply says the company name is more in the nature of a trademark.<sup>117</sup> Regina Music Box appealed to the commissioner of patents, arguing he had no authority to refuse to register the label, but the commissioner of patents affirmed the refusal, citing *Higgins*.<sup>118</sup>

This was in turn appealed to the Supreme Court of the District of Columbia in 1903, now the U.S. District Court, which reversed the Commissioner of Patents and mandated the registration of the label.<sup>119</sup> The Court there reviewed the precedents it had issued, specifically the *Schumacher* and *Willcox* cases, and held that these cases had not been overruled, and the Commissioner of Patents had no discretion to refuse registration of a label, and also lacked discretion to add requirements like descriptiveness not specifically enumerated in the statute. The Court took particular issue with the Commissioner’s reference to the *Moodie* case as being a reversal of these precedents, noting the Court had not issued an opinion in *Moodie*, nor was there evidence of briefing or argument. One gets the impression that this was the rupture of a long *détente*, where the issue had not been raised in some time but was now being raised again. One suspects this is mostly due to the D.C. Supreme Court feeling a sense of futility of issuing mandamus with the *Moodie* case, and then label registration was disrupted for most of the 1890s by the *Higgins* case. With label registration back, so was the question of the Commissioner’s discretion.

Following this, the case was appealed to the D.C. Court of Appeals, now the D.C. Circuit Court of Appeals, which affirmed the decision of the Commissioner of Patents and reversed the D.C. Supreme Court.<sup>120</sup> In so doing the court took a broader view of discretion in examination of labels, holding that it not “a simple, ministerial act,” but rather that the “Commissioner was called upon to decide whether the thing presented for regis-

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<sup>116</sup> At the time music boxes were the dominant form of mechanical reproduction, and Regina had a 80-90% share of that market, but gramophones and player pianos were about to usurp their position, and Regina would eventually shift their business to making vacuum cleaners. ARTHUR W. J. G. ORD-HUME, *THE MUSICAL BOX: A GUIDE FOR COLLECTORS, INCLUDING A GUIDE TO VALUES* 227 (1995).

<sup>117</sup> *Ex parte Regina Music Box Co.*, Dec. Comm’r Patents 286(1902), <https://babel.hathitrust.org/cgi/pt?id=COo.31924070279967&view=1up&seq=306>.

<sup>118</sup> *Id.*

<sup>119</sup> *United States ex rel. Regina Music Box Co. v. Allen*, 31 Wash. L. Rep. 114 (D.C. 1903).

<sup>120</sup> *Allen v. United States ex rel. Regina Music Box Co.*, 22 App. D.C.271 (D.C. Cir.1903), <https://babel.hathitrust.org/cgi/pt?id=COo.3192411666727&view=1up&seq=291>.

tration was or was not a label as defined in the statute.”<sup>121</sup> The Court then quoted the Supreme Court’s recent decision in *Riverside Oil Co. v. Hitchcock*, holding that they had “no power whatever under [the] circumstances to review his determination by mandamus or injunction.”<sup>122</sup> Accordingly, the Court reversed the decision of the lower court and ordered the action dismissed.<sup>123</sup> It was now clarified that the Commissioner of Patents had discretion to examine copyright registrations for labels, and to reject them based on his regulations, even the statute did not strictly require it.<sup>124</sup>

Through all this the Patent Office continued to engage in substantive examination of commercial prints and labels, rejecting a substantial percentage of commercial prints and labels each year.<sup>125</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The same court would endorse and repeat this finding in 1914, reiterating that “the duties imposed upon the Commissioner of Patents under the act of 1874 are not merely ministerial, but call for a decision as to whether or not the thing presented is entitled to registration,” where the commissioner refused to register a label because a highway is not an “article of manufacture.” *United States ex rel. Lincoln Highway Ass’n v. Ewing*, 42 App. D.C. 508, 511 (D.C. Cir. 1914).

<sup>125</sup> Comparing application over rejection rate is always a bit complicated, in that some years may be artificially low or high (even over 100%) because of processing backups – the point is that the rate was continuous, recognizing that no individual year is a perfect representation of the actual rejections that year.

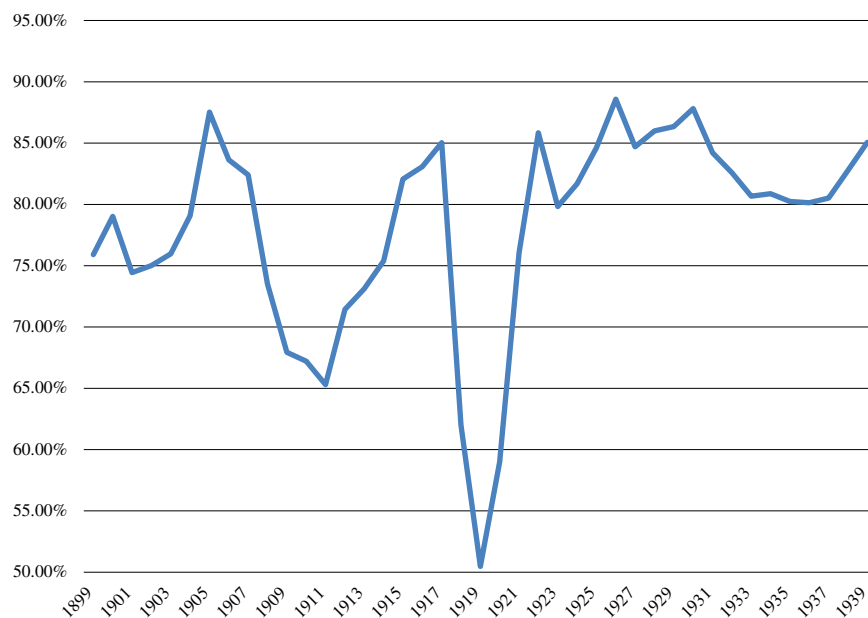


Figure 2- Registration Rate for Commercial Prints and Labels 1899-1939 (3-year Averages)

The registration rate for these labels seems largely in line with the registration rate for graphical works at the copyright office decades later, as will be discussed *infra*. For reasons that are unclear the registration rate dropped dramatically in 1919 and 1920 before returning to nearly 90% the following year, causing the notable dip at that time.<sup>126</sup>

### 3. Rise of the Copyright Office

In response to rejections, applicants were beginning to assert that there was no “statute which confers with the Librarian of Congress the authority to determine what is or is not registrable.”<sup>127</sup> In December of 1897, Valentine H. Everson attempted to register *The Everson Stock Book* for copyright by delivery of a printed title page and the fee, accompanied by two copies of the complete work.<sup>128</sup> The Register of Copyrights refused to register the work, on the grounds that it was not subject to copy-

<sup>126</sup> One wonders if the pandemic at the time contributed to this.

<sup>127</sup> Letter from Wallace A. Bartlett, *supra* note 69.

<sup>128</sup> Case File, *Everson v. Young* (1898), <https://archive.org/details/everson-v-young-file>. One wonders if the case would have gone differently if they had waited to deposit until after registration, as it would be difficult to know that the book was merely forms from the title page alone.

right as a book of blank forms.<sup>129</sup> In response, for the first time on record, Everson attempted to challenge the denial by filing an order for the Librarian of Congress to show cause why mandamus should not issue to compel the Librarian of Congress to register the book for copyright with the Supreme Court of the District of Columbia.<sup>130</sup> Although there had been challenges to rejections by the Patent Office, noted in the previous section, this was the first challenge to rejection of a copyright at the Library of Congress. In their argument, counsel for Everson argued that “no judicial authority is vested in the Librarian of Congress,” and contrasted the copyright laws with the trademark and patent laws that expressly granted the Commissioner of Patents such discretion.<sup>131</sup> The Court considered the issue and held that the 1870 Act did not give the Register of Copyrights discretion to deny registration.<sup>132</sup> However, the Court noted that the blank book of forms clearly was not within the scope of copyright law following the Supreme Court’s decision in *Baker v. Selden* two decades earlier.<sup>133</sup> Accordingly, the Court declined to issue mandamus to compel registration, noting that “if a writ should issue in this case it would be to require the Librarian of Congress to do a vain thing; which courts do not do in any proceeding, and much less on an application for mandamus.”<sup>134</sup> In other words, the Librarian (and the Register of Copyrights who worked for him) had no discretion to deny registration, but no remedy existed for denial of registration if the work was not properly the subject of copyright. Interestingly, a later internal memo from the Copyright Office suggests that an applicant who was denied could have recovered damages from the Register of Copyrights and Librarian of Congress.<sup>135</sup> The conclusion that

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<sup>129</sup> It is in fact not entirely clear the Register of Copyrights was involved. Solberg took over the position of Register of Copyrights months before this, so one would assume that he was involved, but the Librarian of Congress is the only party named. Whether the Librarian was the defendant as a matter of procedure or substance is unclear.

<sup>130</sup> *Matter of Copyright: Effort to Compel Librarian Young to Record a Book*, WASH. EVENING STAR, Jan. 29, 1898, at 12. This Court would become the modern U.S. District Court for the District of Columbia, Supreme Court of the District of Columbia, 1863-1936, Federal Judicial Center, <https://www.fjc.gov/history/courts/supreme-court-district-columbia-1863-1936> (last visited Jan. 14, 2023).

<sup>131</sup> Argument of George Morrison on behalf of Valentine H. Everson, in *Everson v. Young* case file.

<sup>132</sup> United States. *Ex rel. Everson v. Young*, 26 Wash. L. Rep. 546 (D.C. 1898). The case isn’t available on commercial databases, but is at: <https://babel.hathitrust.org/cgi/pt?id=HVd.h4fs1&view=1up&seq=558>.

<sup>133</sup> *Baker v. Selden*, 101 U.S. 99 (1879).

<sup>134</sup> Although no citation is provided, this proposition was well established by this point. *Cristman v. Peck*, 90 Ill. 150, 151 (1878)

<sup>135</sup> Ernest Bruncken, Assistant Register of Copyrights, U.S. Copyright Office, Memorandum re: powers of Register, Nov. 10, 1909 (copy on file with author).

registration was a ministerial task did not bode well for copyright examination practice, but the newly appointed Register of Copyrights does not seem to have been fazed by this. Under his guidance the Copyright Office would enter the twentieth century in a rush of rapid modernization to application and examination process. The days of The Librarian opening all mail personally and making marks with a blue pencil were gone as Thorvald Solberg's became the first official Register of Copyrights.<sup>136</sup>

Although there had been clerks assigned to copyright matters in the Library beforehand, the creation of the position of Register of Copyrights in 1897 marked the origin of a copyright office in many ways separate from the Library that housed it, and also marked a fundamental shift and professionalization in how the copyright function of the Library of Congress was executed. 1897 was by all accounts chaotic as the Library moved from the capitol building to its new home across 1st St. NE, in what is now the Jefferson Building, and in 1898 the new Register of Copyrights Thorvald Solberg began introducing many innovations, including application forms for copyright registration. For the first two years the registration records look pretty similar, but for the new century new classification scheme for copyrights was devised, named the "XXC" (as in twentieth century) classification system, and was used to better organize and track applications and registrations. In what had previously not been noticed before, the Copyright Office also began keeping track of what it was rejecting, offering the first systematic statistics outside of commercial prints and labels.<sup>137</sup>

The Copyright Card Catalog, located in the Copyright Reading Room at the Library of Congress, is the largest card catalog in the world.<sup>138</sup> The

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<sup>136</sup> As mentioned above, Spofford had de facto been the register of copyrights, but Solberg was the first to hold the official position.

<sup>137</sup> A 1903 volume from the American Publishers Copyright League even contains two brief "opinions" of the Register of Copyrights on registration of blank books registration fees for foreigners, suggesting greater formalization of registration practice. ARTHUR S. HAMLIN, *OPINIONS ON QUESTIONS OF COPYRIGHT AND ON THE INTERPRETATION OF THE COPYRIGHT STATUTE OF THE UNITED STATES* 4-6 (1903)

<sup>138</sup> Although this statement is sometimes hedged as being "among" the largest, a 2005 Copyright Office publication states that it is the largest. Judith Nierman, *Copyright Lore*, Copyright Notices 8 (Sept. 2005). The same statement was made in 1980 the Register of Copyrights stated that it was the largest, even before card catalogs became largely replaced by electronic systems. David Ladd, Register of Copyrights "If it Ain't Broke, Don't Fix It:" Some Reflections on the Copyright Office in the Library of Congress, Address Delivered to the Annual Meeting of the Section of Patent, Trademark, and Copyright Law of the American Bar Association (Aug. 4, 1980), *included as exhibit to Patent and Trademark Law Amendments of 1980*, 96th Cong. House of Representatives, 86th Cong., 208, 215 (1980)). In his FY 1956 appropriation request, the Register of Copyrights stated that the

more current material is closer to the entrance to the room, but in the back left corner of the back room of the copyright card catalog, there are two unmarked card catalog drawers, which upon examination contain index cards of works rejected for copyright registration. The cards show dates between 1898 and 1904, along with a single one from 1905. When counted, the 1,355 cards tell us what was being and rejected following examination in those years.<sup>139</sup>

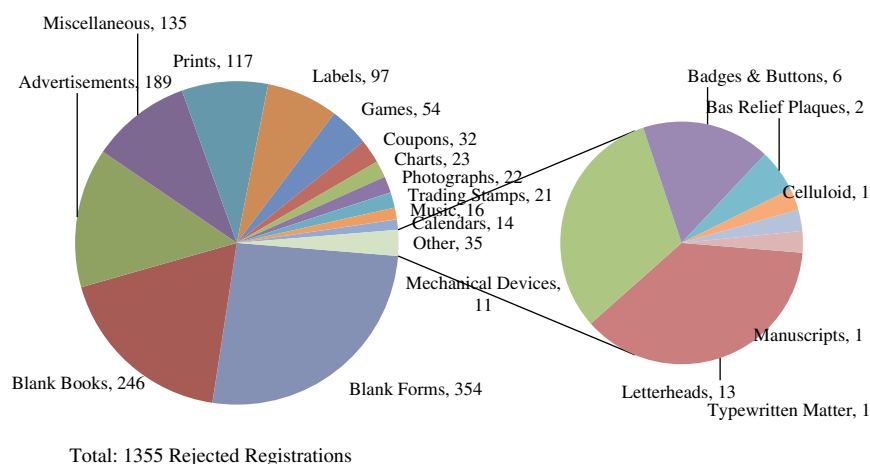


Figure 3 - Rejections of Copyrights by Subject Matter, 1898-1904

The magnitude of rejections shouldn't be overstated — there were 673,286 titles entered for copyright in 1898-1904, of which 601,604 were subsequently perfected by deposit. However, even if they only represent a small percentage of applications, these rejections are important because they show that substantive examination was ongoing under the new Register of Copyrights from the beginning.

The largest categories of works being rejected are Blank Books and Blank Forms, which were ineligible for copyright pursuant to the Supreme Court's decision decades earlier in *Baker v. Selden*.<sup>140</sup> Likewise prints and advertisements were rejected pursuant to the 1874 Commercial Print and

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copyright card catalog was the "largest card catalog in the Library and perhaps in the world." *Legislative Appropriations for 1956, H. Before, the Subcomm. Of the Comm. On Appropriations, 84th Cong., 122 (1955)*, [https://www.google.com/books/edition/Legislative\\_Branch\\_Appropriations\\_for/RQW0f0QzutwC?hl=EN&gbpv=1&dq=copyright+%22largest=card=catalog%22&pg=RA3-PA122&printsec=Frontcover](https://www.google.com/books/edition/Legislative_Branch_Appropriations_for/RQW0f0QzutwC?hl=EN&gbpv=1&dq=copyright+%22largest=card=catalog%22&pg=RA3-PA122&printsec=Frontcover).

<sup>139</sup> These statistics are based on a hand count by the author, so there may be minor variances.

<sup>140</sup> 101 U.S. 99 (1880).

Label Act discussed *supra*. The remainder are a grab bag of categories, some of which remain uncopyrightable, others of which were copyrightable then, but perhaps represented improper applications. The miscellaneous category is a potpourri generally containing works similar to the overall breakdown of classified rejections, and it isn't obvious why they were classified as miscellaneous. Regardless, this card catalog shows a clear effort to keep track of the paper going in and out of the office and be able to find what was being rejected.

And then in 1905 the rejection card catalog stops. It isn't clear why, but the easiest guess is that Solberg was distracted by the responsibility of drafting what would become the 1909 Copyright Act, and the years of debates which followed, working with Congress and stakeholders to see the bill to completion. Solberg was mindful of the *Everson* case, and how the court had asserted he had no authority to review applications in contrast to enabling statutes for the Patent Office. In his draft bill, he modeled new language from the statute for trademark registration at §52, providing

[t]hat, subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make reasonable rules and regulations, not inconsistent with the provisions of this Act, for the conduct of proceedings with reference to the registration of claims to copyright as provided by this Act: Provided, that no breach of such rules or regulations shall affect the validity of the copyright.<sup>141</sup>

The last sentence was added pursuant to the suggestion of William A. Livingstone, a publisher from Detroit who specialized in photo prints.<sup>142</sup> However, it would be removed to clarify that failure to deposit could result in loss of copyright,<sup>143</sup> and the final version of this provision, moved to §53, also deleted the requirement that such rules and regulations should be “reasonable” and fixed the double negative of “not inconsistent.”<sup>144</sup> The final version of the clause simply provided “[t]hat, subject to the approval of the Librarian of Congress, the register of copyrights shall be authorized to make rules and regulations for the registration of claims to

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<sup>141</sup> THORVALD SOLBERG, *THE COPYRIGHT BILL COMPARED WITH STATUTES NOW IN FORCE* (1906), <https://archive.org/details/TheCopyrightBillComparedWithStatutesNowInForce1906/page/n65/mode/2up>.

<sup>142</sup> Stenographic Report of the Proceedings of the Librarian's Conference on Copyright, 3d Session, at Library of Congress, Washinton, D. C., Part E 38-43 (Mar. 13-16, 1906).

<sup>143</sup> *Copyright Code Defects*, PUBLISHERS WEEKLY, July 3, 1909, at 21, 22 (reprinted in 1909 Act legislative history).

<sup>144</sup> An Act to Amend and Consolidate the Acts Respective Copyright (Mar. 4, 1909), <https://www.copyright.gov/history/1909act.pdf>. The reasonableness provision was excised much more quickly, being removed by the January 1907 draft bill. H.R. REP. NO. 7083, Jan. 30, 1907 with H.R. 25133 Attached – 59th Congress 2d Sess. Part N – Jan. 30, 1907, § 46.

copyright as provided by this Act.” A House Report mentioned that the “new provision” was “not intended to confer upon the Register of Copyrights any judicial power,” and was so drafted.<sup>145</sup> And indeed, although the last sentence of the draft bill was removed, the question would linger of what effect failure to comply with the Register’s new regulatory power would mean.

*D. 1909-1977 – The Era of Standardization*

The 1909 Copyright Act was the most significant change in American copyright law, fundamentally altering the relationship of copyright registration to the U.S. economy.<sup>146</sup> Most fundamentally for current purposes it changed the order of registration from being after publication, rather than before, allowing the Copyright Office to examine the completed work before deciding on whether to grant the registration. Technically copyright registration became optional for protection with the new law, with the only requirement for protection being publication with notice, but in practice registration was the rule, rather than the exception, at least for published books.<sup>147</sup> The new copyright law also did not list the types of works which were subject to copyright, but instead provided that “works for which copyright may be secured under this Act shall include all the writings of an author.”<sup>148</sup> Section 5 of the new law required the applicant to specify which of an enumerated number of classes the work belonged to, but specifically provided that this “specifications shall not be held to limit the subject-matter of copyright as defined” above as “all the writings of an author.”<sup>149</sup> However, the Copyright Office was wary of departing from previous practice, and a memo from shortly after the new law was passed states that the Register “must ascertain that the work offered belongs to one of the classes enumerated . . . there is no provision made for copyright on anything else.”<sup>150</sup> As such, the Copyright Office did not immediately depart from previous examination practice, but the focus on form of work by the Copyright Office would eventually fade to match the new law.

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<sup>145</sup> Report, *Id.* At 17.

<sup>146</sup> Zvi Rosen & Richard Schwinn, *An Empirical Study of 225 Years of Copyright Registrations*, 94 *TULANE L. REV.* 1003 (2020)

<sup>147</sup> *Id.* The 1909 Law somewhat confusingly required deposit, and copyright could be invalidated for failure to deposit, but never explicitly required registration. But if you were sending in your deposit anyway, it only made sense to register in the process. In 1950, a new Compliance Section began requesting registration of published music with a copyright notice as well. *Music: Copyright Claims Sifted by U. S. to Assure Registry*, *BILLBOARD*; Apr 15, 1950; at 13

<sup>148</sup> 1909 Act § 4.

<sup>149</sup> *Id.* §§ 4-5

<sup>150</sup> Bruncken Memo, *supra* note 135.



### 1. 1909-1945 – Creating a Modern Agency

With the new copyright law, the Copyright Office shifted into high gear to create a modern system for registration. A multiplicity of application forms was devised, one for each subtype of registration, some 40 or so total — each designed to be filed in a card catalog after being approved, to allow for convenient recordkeeping.<sup>151</sup> Although the process of issuing explanatory circulars dated back to Spofford's procedures for responding to letters, the Copyright Office expanded and improved on these, and prepared a whole new set of them for the 1909 Act.<sup>152</sup> The Copyright Office also established new internal rules and procedures, setting a procedure for processing all mail, including separating out “irregular” applications.<sup>153</sup> However, recordkeeping of applications which were rejected did not follow, and such records for the period are once again anecdotal. Any accounting of rejections is further hindered by the fact that rejected applications were typically returned, along with the fee, making recovering the records difficult.

With the 1909 Act, the new Copyright Office circulars did not announce a new approach to registration per se. Circular 32 banned the registration of blank forms, Circular 27 announced that works that did not fit into existing categories of registrable works would not be registered, and Circular 19 explained that names or titles could not be registered. Internal rules also provided some guidance, for instance that words for a song without music would be rejected if registration was attempted as an unpublished musical composition.<sup>154</sup> As before there was no explicit provision of the copyright law for rejection based on subject matter, but a 1915 opinion of the Attorney General provided some basis for the continued prac-

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<sup>151</sup> A compilation of application forms used for 1909-1945 held by the U.S. Copyright Office was scanned by the author. U.S. Copyright Off., *U.S. Copyright Office Pre-1945 Application Forms* (1954), <https://archive.org/details/US.CopyrightOfficeOldAppForms>. Note that although every form is included, there were minor variations to these forms over the years which may not be reflected – the forms scanned are from the final generation in the 1940s.

<sup>152</sup> United States Copyright Office, *Copyright Office Information Circulars and Circulation Letters* (1909), <https://archive.org/details/copyrightcirculars>. The *Washington Post* noted that “[t]here are thirty-five of these printed forms of replies, and some of them are exceedingly funny, covering points which only a genius in the way of asking questions could discover.” *Vagaries of Authors: Curious Ideas Entertained About Copyrights*, WASH. POST, Nov. 25, 1900, at 32.

<sup>153</sup> U.S. COPYRIGHT OFFICE, *COPYRIGHT OFFICE RULES OF PRACTICE* (1903), <https://archive.org/details/1909CopyrightOfficeProcedures>. This book of rules printed on onion paper is held by the Copyright Office and was scanned by the author. It was meant only for internal use and does not contain excessive organization. Some parts of the volume, such as the procedures for handling different types of applications, may date from around 1916.

<sup>154</sup> *Id.*, Rule dated July 8, 1909, at 9.

tice of examination.<sup>155</sup> In 1930 an attempt was made to explicitly divest the Register of Copyrights of authority to examine applications in the Vestal Bill, but this did not become law.<sup>156</sup>

One gets the sense that examination largely continued under Solberg's long tenure — ending in 1930 — much as it had in 1898-1904. No systematic index of rejections exists for this period, but we do know anecdotally about rejections occurring. For instance, as part of his attempt to protect his big band from competition from its own recordings, the bandleader Fred Waring attempted to register one of these recordings for copyright. Sound recordings were not yet protected by copyright (and would not be until 1972, although protections existed under state law), and the Copyright Office denied the claim.<sup>157</sup> Interestingly, the Copyright Office decided that it would permit the registration of piano rolls in 1911 as musical arrangements, explaining that because “copyright registration . . . is . . . merely the recordation of a claim which might be sustained by the courts, or not,” and because denial of registration would seriously prejudice the applicant, registration was appropriate.<sup>158</sup> This represented an early appearance of the “rule of doubt” where the Copyright Office would register a work unless certain it was not copyrightable. However, where roll producers saw this and attempted to register piano rolls without the subterfuge of copyright being claimed in the arrangement or editing, the Copyright Office rejected the claim.<sup>159</sup> In other words, the Copyright Office was liberal in accepting arguments in support of registration, but would not accept a registration that was clearly contrary to the law.

<sup>155</sup> Copyright of Lithographic Prints, 30 Ops. Att’y Gen. 422 (1915), <https://babel.hathitrust.org/cgi/pt?id=OSu.32437000654315&view=1up&seq=468&skin=2021>. The German ambassador contended that the copyright office was required to register lithographs for copyright, with a determination of the validity of their copyright left to the courts. The attorney general rejected this, finding that the Register of Copyrights possessed “at least some measure of discretion in the administration” of the copyright law. *Id.* at 424.

<sup>156</sup> H.R. 11852 § 36 (1930). The Vestal Bill’s main focus was to add design protection to copyright law, and it passed the House of Representatives before dying in the Senate. *The Vestal Bill for the Copyright Registration of Designs*, 31 COLUM. L. REV. 477-493 (1931),

<sup>157</sup> *Waring v. WDAS Station, Inc.*, 194 A. 631, 638 n.2 (Pa. 1937).

<sup>158</sup> Letter from Thorvald Solberg, Register of Copyrights (Oct. 2, 1911) (copy on file with author); *explaining registration of Schubert Impromptu*, op. 90, no. 3, in G, *Player piano roll as executed by Teresa Carreño*, Copyright Registration No. E242448 (1910). The practice would continue, although copyright needed to be claimed in something other than the roll itself. *Impromptu; by Schubert*, op. 90, ed. By Mary Angell, played by Ivan Kerouak, Chicago, Cable co. (Solo Carola, no. 73516) [Music roll], Copyright Registration No. E493590 (1920) (“Copyright is claimed on editing”).

<sup>159</sup> U.S. Copyright Office Memorandum, *American Piano Co. by Mr. L.A. Janney* (June 3, 1914) (copy on file with author).

This practice can also be seen from other times where applications were rejected, with the Copyright Office forming a legal opinion and then enforcing it. In the 1930s, attempts would be made to register typeface designs for copyright, and these applications were repeatedly refused.<sup>160</sup> In 1929, in response to an inquiry, Solberg informed a potential applicant that designs for a textile fabric were not considered subject to copyright and implicitly would not be registered.<sup>161</sup> In 1926, there was also a brief furor about a Copyright Office rule under which an application by a married woman under her maiden name would be denied, which was partially reversed following an outcry.<sup>162</sup> Even in the 1920s, this was called “incredibly old-fashioned,” and suggests that by then the Copyright Office had fallen behind the times.<sup>163</sup>

Despite these areas where claims were rejected, the major controversies of the era would concern the Office’s authority to determine whether something was “published.” Under the 1909 Act in particular, most material was only registrable if it was published, with performing works being the main exception. In a series of cases courts held that: “[t]he unrestricted offer of even a single copy to the public” constitutes a publication, when followed by deposit of two copies for copyright registration.<sup>164</sup> In 1910, a newly appointed District Judge in New York, Learned Hand, made this clear when he held that the sale of a single copy of the song *I Don’t Like You* by Clare Kummer to a music dealer was sufficient for the

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<sup>160</sup> In 1930, Lucien Bernhard attempted to register “Bernhard Medium Italic Gothic” as a book, which was rejected; he attempted to register “Bernhard Gothic Light Italic” the following year to similar effect. *Eltra v. Ringer* app’x at 215-30. In 1937, an attempt by the Bauer Type Foundry Co. to register a new typeface as artwork was rejected again, with the Register sending the applicant a multi-page opinion explaining why. *Id.* at 235-239. Further attempts would be made in succeeding years. *Id.* at 254-282.

<sup>161</sup> Brief on Behalf of Cheney Bros, Plaintiff-Appellant, *Cheyney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2nd Cir. 1929), <https://archive.org/details/cheneysilk-v-doris-case-file/page/48/mode/2up>; *Cheney Brothers v. Doris Silk Corp.*, 35 F.2d 279 (2nd Cir. 1929). As he explains, this was related in part to the continuing advocacy for a bill establishing design protection, and his assumption that designs were therefore not protected by current law.

<sup>162</sup> *Solberg Modifies Copyright Ruling*, N.Y. TIMES, Dec. 21, 1926, at 22. <https://timesmachine.nytimes.com/timesmachine/1926/12/21/118879208.html?pageNumber=22>. Apparently, an explanation of why a married woman wanted to use her maiden name was still needed.

<sup>163</sup> *Id.* A bill was introduced to undo this practice, but it did not become law at the time. A Bill Providing that claims to copyright by married women shall not be held invalid or prejudiced by reason of having been made in the name of the author. H.R. 15546, 69th Cong. (Dec. 21, 1926).

<sup>164</sup> *Werckmeister v. Am. Lithographic Co.*, 134 F. 321, 325 (2d Cir. 1904).

purposes of establishing publication for registration.<sup>165</sup> This worked acceptably when the deposit material was the finished product. But when material was deposited in an unfinished form, the Copyright Office was unsure if they could accept it — the material they were receiving was not the form to be published, even if it had technically been “published” by a single sale. Thus, for instance, the Copyright Office generally rejected typewritten material because it was not in a form meant for publication — as duplication of typewritten material at scale was cost-prohibitive, the presumption was that typewritten deposits were not in fact copies meant for sale.<sup>166</sup> However, attempts to register proof copies — preprint material designed for review, coupled with questions about bundling multiple works into one volume for copyright registration, would lead to litigation that questioned the ability of the Copyright Office to regulate the registration process.<sup>167</sup>

a) The Fight Over “Catholic and Patriot”

As it became clear in 1927 that New York Governor Al Smith would be the first Catholic major party nominee for President the following year, conspiracy theories about his religion and candidacy were rife.<sup>168</sup> An open letter from a prominent Episcopalian would prompt Smith to re-

<sup>165</sup> *Stern v. Jerome H. Remick & Co.*, 175 F. 282, 284 (C.C.S.D.N.Y. 1910). This case had previously been to the U.S. Supreme Court, which dismissed the appeal without an opinion, on the question of whether the seizure of infringing copies was properly done. *Stern v. Jerome H. Remick & Co.*, 164 F. 781, 782 (C.C.S.D.N.Y. 1908), *Writ of Error dismissed for want of final judgment*, *Jerome H. Remick & Co. v. Stern*, 215 U.S. 585 (1909).

<sup>166</sup> In May of 1935, the International Magazine Co. attempted to register the book *Hide the Body* by Grace Sartwell Mason by submitting two typewritten copies. Letter to William L. Brown (May 2, 1935). William Brown, the Register of copyrights at the time, indicated that the presumption was against registration of typewritten material, and urged that the applicant explain why typewritten material was appropriate, or deposit printed copies instead. William L. Brown Letter (May 7, 1935). The applicant then deposited printed copies and the registration was granted, at which point the typewritten copies originally deposited were returned. Letter from William L. Brown (May 28, 1935); Registration AA 195174 (May 21, 1935).

<sup>167</sup> This controversy over registrability of proof deposits went back to at least 1906, when in the application for copyright in *Growth*, a novel by Graham Travers, the Attorney General stated he was “inclin[ed] to think that proof sheets. . .do not constitute ‘copies’. . . and recommended[ed] that they be rejected.” Letter from Acting AG M.D. Purdy to The President (Nov. 3, 1906), 15 COPYRIGHT OFFICE BULL. 3082, <https://babel.hathitrust.org/cgi/pt?id=OSu.32437122670025&view=1up&seq=894>.

<sup>168</sup> Thomas J. Shelley, *What the Hell Is an Encyclical? “: Governor Alfred E. Smith, Charles C. Marshall, Esq., and Father Francis P. Duffy*, 15 U.S. CATHOLIC HISTORIAN 87 (1997).

spond in the pages of the *Atlantic Monthly*,<sup>169</sup> and the magazine's attempt to register the copyright in Smith's contribution would lead to the first major controversy over whether page proofs could be registered for copyright.<sup>170</sup>

On April 11, 1927, the Copyright Office received an application for copyright registration from The *Atlantic Monthly* for Smith's piece, entitled *Catholic and Patriot*, which they wished to register for copyright as proprietor of the work. However, the deposit copies attached were not printed copies, but rather proof copies — preliminary prints which had been made to check for errors on inferior paper. In response, on April 13, 1927, Thorvald Solberg wrote to the *Atlantic Monthly* stating that it was “a serious question whether the Copyright Office is empowered by law to accept proof copies as the deposit required for registration of a book. Instead, Solberg suggested the *Atlantic Monthly* register the piece as a contribution to a periodical once published in the magazine, and enclosed a courtesy copy of form A-5 to that end.<sup>171</sup>

Initially, the *Atlantic Monthly* stated they would do that, although they were surprised at the rejection, stating they had “sent previous applications with this same type of material to you, and secured registration without any trouble.<sup>172</sup> However, on April 20, the *Atlantic Monthly* telegraphed the Copyright Office requesting that they register the application for the proofs as filed, stating that the deposit material “were not proof copies but were part of several hundred identical copies intended for sale and publication.”<sup>173</sup> The following day Solberg wrote to the *Atlantic Monthly*, informing them that he had instructed his staff to register the original application and enclosing the registration certificate.<sup>174</sup>

In a subsequent interview with the Department of Justice, Solberg's legal assistant recalled that it had come to the attention of the Copyright Office that *Catholic and Patriot* had been reprinted without permission in

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<sup>169</sup> *Id.*; Alfred E. Smith, *Catholic and Patriot*, ATLANTIC (May 1927), <https://www.theatlantic.com/magazine/archive/1927/05/catholic-and-patriot/306522>.

<sup>170</sup> To prepare for the *Fox v. Bouve* case, discussed *infra*, the Department of Justice, which was defending that case, prepared a set of typewritten questions and answers from Richard C. DeWolf, a Senior Attorney with the Copyright Office and the Register's legal assistant in 1927. The below is sourced mainly from that, although copies of the correspondence are also preserved in the file. Copies on file with the author. DeWolf was a scholar of copyright as well, publishing *An Outline of Copyright Law* in 1925, and served as the Acting Register of Copyrights in 1944–1945. *Richard Crosby De Wolf Acting, 1944–1945*, COPYRIGHT.GOV, [https://www.copyright.gov/about/register/dewolf/act\\_dewolf.html](https://www.copyright.gov/about/register/dewolf/act_dewolf.html) (last visited Jan. 31, 2022).

<sup>171</sup> Letter from Thorvald Solberg to the *Atlantic Monthly* (Apr. 13, 1927). .

<sup>172</sup> Letter from the *Atlantic Monthly* to Thorvald Solberg (Apr. 16, 1927). .

<sup>173</sup> Telegraph (in DOJ case file on file with author)

<sup>174</sup> Letter from Thorvald Solberg to the *Atlantic Monthly* (Apr. 21, 1927).

at least two newspapers, and the *Atlantic Monthly* wanted to bring suit, which is part of why the Office acceded to the request of the *Atlantic Monthly* despite its misgivings. Sure enough, the case was litigated, and the Court's opinion would explain the background of the case — Smith had wanted *Catholic and Patriot* widely reprinted, but the *Atlantic Monthly*, contrary to his wishes, had attempted to exert proprietary control over it.<sup>175</sup> The *Atlantic Monthly* sold a single copy of the proof to its treasurer, and sent two copies to the Copyright Office, as noted above.<sup>176</sup> The *Boston Post* then bribed a night watchman at the *Atlantic Monthly* for a copy of *Catholic and Patriot* and reprinted it in their newspaper.<sup>177</sup> However, the *Atlantic Monthly* then allowed widespread reprinting of *Catholic and Patriot* in other newspapers, without copyright notice, and the Court found this amounted to an abandonment of the copyright and dismissed the case.<sup>178</sup> Thus the question of registration of proof material was not litigated here, but in time a new Register would come who would be more willing to say no to applicants, and litigation would ensue as to whether he had such power.

b) *King v. Bouvé* – Comic Strips and Registration Fees

In 1928 the copyright office raised the fees for copyright registration from \$1 to \$2.<sup>179</sup> In response to this, King Features Syndicate, a major proprietor of syndicated content for newspapers (mainly comics but also other material like horoscopes), changed their registration practices to avoid absorbing the cost of the fee increase. Syndication had become a major feature in the newspaper market, as new technological developments made it possible to distribute content to newspapers across the country faster than ever, and that syndicated content had much more monetary value than a columnist in a local paper.<sup>180</sup> Previously, King had registered each piece individually, paying a dollar each.<sup>181</sup> With the fee increase, King began bundling over a hundred pieces into one collection and registering that for copyright as a book, following a single sale to a

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<sup>175</sup> *Atl. Monthly Co. v. Post Publ'g. Co.*, 27 F.2d 556 (D. Mass. 1928).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Act of May 23, 1928, Pub. L. No. 70-478, 45 Stat. 713.

<sup>180</sup> Julia Guarneri, *How Syndicated Columns, Comics and Stories Forever Changed the News Media*, SMITHSONIAN MAG. (Oct. 30, 2019), <https://www.smithsonianmag.com/history/how-syndicated-columns-comics-stories-for-ever-changed-news-media-180973431>.

<sup>181</sup> The material from this section is largely taken from the extensive file on this case at the National Archives in the Department of Justice Collection. The Department of Justice represented the Copyright Office in this case. Copies on file with the author.

corporate insider. The fees being paid by King to the Copyright Office thus dropped from \$400 a month at a dollar a registration to more like \$500 a year following the fee increase. There is no evidence that Thorvald Solberg took any action based on this prior to his retirement in 1930, at which point he was succeeded as Register of Copyrights by William L. Brown. In May of 1933 Brown wrote to King's attorneys noting "The Office is seriously in doubt. . . of its authority to make these registrations," noting both the Register's responsibility to collect fees and the difficulty of identifying material due to the general titles of the volumes.<sup>182</sup> However, on June 1, Brown indicated that following conversations with King's representative the Copyright Office agreed to accept the registrations, but "not as precedent for future registrations covering like quantities of material on a single application."<sup>183</sup> King asked for guidance on what would be acceptable, but the Register declined to give specific guidance, noting that attempting to register three months of material would be "going too far," while a week of material would probably be acceptable, but declined to issue guidelines and made clear that the whole exercise of registering proofs was problematic.<sup>184</sup> The matter was effectively tabled for the next Register.

On August 1, 1936, Clement L. Bouvé, generally called Col. Bouvé following his service in World War 1, was appointed Register of Copyrights.<sup>185</sup> His appointment marked a shift for the Copyright Office — although Solberg's early tenure was marked by energy and change, as his 33 year tenure went on things seemed to be more status quo, and his successor Brown was more interested in law reform and joining the Berne Convention than the administration of the office. Bouvé's biography on the Copyright Office website notes that

[h]e was a firm believer in the registration system, and his administration of the Copyright Office was notable both for the improvements he made in the organization of the Office and for his constant and energetic endeavor to obtain strict compliance with the conditions and formalities fixed by the statute for securing and maintaining copyright, especially the deposit provisions that enrich the collections of the Library of Congress. This effort included the creation of a legal staff, the establishment of an Examining Section to pass in the first instance on all applications, and the formation of a Revisory Board comprising attorneys and other exper-

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<sup>182</sup> Letter from William L. Brown to King's attorneys (May 11, 1933).

<sup>183</sup> Letter from William L. Brown to King's attorneys (June 1, 1933). This is an example of the "rule of doubt" approach at the Copyright Office, where registration would be granted in doubtful cases "for whatever it may be worth." § 17:129. Rule-of-doubt registrations, 5 PATRY, *supra* note 8, § 17:129.

<sup>184</sup> Letter from William L. Brown to King's attorneys (June 7, 1933).

<sup>185</sup> *Clement Lincoln Bouvé, 1936-1943*, COPYRIGHT.GOV, <https://www.copyright.gov/about/register/bouve/bouve.html> (last visited Jan. 31, 2022).

enced employees to act on applications initially rejected or those presenting unusual problems.

Bouvé would hold firm in refusing to register material which did not comport with the Office's rules, which in turn would lead to litigation testing the bounds of the Office's power to promulgate rules.<sup>186</sup>

In January of 1937 King Features deposited over a hundred comic strips or cartoons with the name "King Features Illustrated Weekly Vol. I."<sup>187</sup> King had sold two copies to a business partner to establish publication and tendered the fee of two dollars to the Copyright Office. King would later admit at trial that they expected the registration to be refused, and indeed it was, as was the payment of the fee tendered. Anticipating litigation, King included with their application an affidavit from the purchaser of the two copies that he had purchased them without restriction.<sup>188</sup> The Copyright Office wrote in response that these were contributions to a periodical, and the appropriate registration method was to register each individually in that form, and asking for reference to a provision of the Act which empowered the registration of such material bound into book form for purposes of registration.<sup>189</sup>

The Copyright Office held firm on not registering this application, and correspondence reveals that a dialogue was ongoing and meetings were happening over this application. In early 1938 King Features refined their approach, seeking to register collections of King Features weekly as "composite works," which we would now call compilations. As part of their application King Features asserted that the Register of Copyrights "has neither the power nor the machinery for the investigation of the validity of claims to copyright."<sup>190</sup> In response, the Register of Copyrights

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<sup>186</sup> In 1938, Bouvé published a lengthy public letter explaining some of the problems of administering copyright registration with the limited powers he had under the statute, and urged passage of a law that would give him powers more akin to the Commissioner of Patents. Clement L. Bouvé, Letter to the Librarian of Congress concerning certain aspects of the Copyright Act of March 4, 1909 in their relation to the public interest and existing problems of Copyright Office administration, with proposed amendment (1938), <https://catalog.hathitrust.org/Record/006613266>.

<sup>187</sup> In a document filed in subsequent litigation, Vice President of King Features indicated they had submitted such volumes since June 1935. Affidavit of Ward Green (June 24, 1939).

<sup>188</sup> The Copyright Office made clear this affidavit was superfluous, noting that "[i]t is not perceived how the conditions under which King Features sold these proofs, or Mr. Kletter bought or sold them, are relevant to the question of their registration." *Id.* However, this affidavit was necessary for litigation, and preparing it with the registration was a way to expedite that litigation by avoiding preliminary questions.

<sup>189</sup> Letter from Clement L. Bouvé to King Features (Apr. 22, 1937).

<sup>190</sup> Letter from Clement L. Bouvé to Alfred H Wasserstrom, Esq., (Feb. 26, 1937).



asserted he not only had “the power but the duty” to only register an application if it was valid.<sup>191</sup>

This exchange was likely not a surprise to King Features, and following several more filings and similar responses they filed a complaint in October of 1938 requesting injunctive and declaratory relief with the U.S. District Court for the District of Columbia, asking the court to mandate registration of the composite registrations, enjoin the Copyright Office from refusing to register the composite works for copyright, and for declaratory judgment that they had a right to registration of the proof books.<sup>192</sup> As the facts were mostly undisputed the case went to trial on the issues of whether the Register of Copyrights had authority to deny the registration, whether the Register of Copyrights was entitled to deference by the District Court, and whether the proof books were valid composite works within the meaning of the copyright law.<sup>193</sup>

Exactly two years after the complaint was filed the District Court issued a short opinion, finding that law was “as contended for by the plaintiff,” and asked the plaintiff to prepare a draft findings of fact and conclusions of law.<sup>194</sup> Accordingly the Court’s opinion was really written by the attorneys for King Features, and was thus unpublished, although it would subsequently be reprinted in IP-specific reporters.<sup>195</sup> The majority of the opinion is rather fact-bound, but the last paragraph is the important one for purposes of broader issues of authority of the Register of Copyrights, holding that he

has no power to refuse or deny registration of a claim of copyright which is entitled to registration under the Copyright Act. Whether an applicant or claimant has complied with the law so that his claim is entitled to be registered raises questions of fact and law to be decided by the court; the Register of Copyrights has not power to decide such questions, especially where the deposit of copies and the application filed, when read together as they should be, are in apparent compliance with the act.<sup>196</sup>

The Court also declined to defer to the Register of Copyrights, holding that:

[F]indings of fact and conclusions of law made by the Register of Copyrights may be reviewed by the court, and they are neither conclusive nor

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<sup>191</sup> *Id.*

<sup>192</sup> Complaint, *King Features Syndicate, Inc. v. Clement L. Bouve as Register of Copyrights*, Equity Case No. 540 (Oct. 31, 1938).

<sup>193</sup> Plaintiffs and Defendants Trial Briefs, *Id.*

<sup>194</sup> Opinion, *Id.*

<sup>195</sup> *King Features Syndicate v. Bouve*, 48 U.S.P.Q. 237, 23 Copyright Dec. 185 (1940), <https://babel.hathitrust.org/cgi/pt?id=MDp.39015081492293&view=1up&seq=197>.

<sup>196</sup> *Id.*

binding upon the court, and such findings and conclusions, if erroneous, may be rectified by this court.

This decision was problematic for the Copyright Office, but another case from same court involving proof material, was already being appealed, and instead of appealing the King Features case, the Copyright Office focused on an appeal involving 20th Century Fox's attempt to avoid paying separate fees for each installment of serialized novelizations of its films.<sup>197</sup>

c) Fox v. Bouvé – Movie Serializations and Fees

In the silent era of film and beyond, serialized novelizations – telling the story of a movie in multiple newspaper issues – were a vital part of the marketing of the film.<sup>198</sup> The film studio 20th Century Fox was among those participating in this trend, and when they sought to register the copyright in these serializations by depositing proof copies of all sections at once, the newly appointed Register Bouvé refused to accept them. This would lead to litigation which confirmed the result in the King Features case and limited the discretion of the Copyright Office to deny applications for registration of copyright except in cases where the work was not copyrightable.

In January of 1937, 20th Century Fox attempted to register the serialization of their film “Lloyd’s of London” for copyright with deposit of proof sheets.<sup>199</sup> The Copyright Office declined to register it, asserting it should have been applied for as separate contributions to periodicals for each installment.<sup>200</sup> 20th Century Fox tried again in May of 1937 to register the serialization of their film *Slave Ship* in proof form, and this was again rejected, with Lloyd’s of London being cited as precedent for the

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<sup>197</sup> E. Fulton Brylawski, *The Copyright Office: A Constitutional Confrontation*, 44 GEO. WASH. L. REV. 1, 25 (1975). Brylawski notes that “King Features Syndicate and Twentieth Century Fox Film Corp. contrived to save copyright registration fees,” and he may well have had inside knowledge – his father was the lawyer for 20th Century Fox.

<sup>198</sup> Van Parys, Thomas, *The Commercial Novelization: Research, History, Differentiation*, 37 LITERATURE/FILM Q., 305–17 (2009), [www.jstor.org/stable/43797691](http://www.jstor.org/stable/43797691); JAN BAETENS, NOVELIZATION: FROM FILM TO NOVEL 16 (Mary Feeny trans., 2018).

<sup>199</sup> Letter from Edwin P. Kilroe to Clement L. Bouve, Register of Copyright (Jan. 21, 1937). Lloyd’s of London was a historical drama set in the Georgian period and Napoleonic Wars and was a success for the studio. *Lloyd’s of London*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Lloyd%27s\\_of\\_London\\_\(film\)](https://en.wikipedia.org/wiki/Lloyd%27s_of_London_(film)) (last edited Jan. 7, 2022).

<sup>200</sup> Letter from Clement L. Bouvé, Register of Copyrights to Edwin P. Kilroe (Feb. 19, 1937). He also noted that most sections did not have a copyright symbol, suggesting they were thus published without a separate copyright notice if already published, and thus the registration was defective.

rejection.<sup>201</sup> Nonetheless, 20th Century Fox tried again, applying for copyright registration of the serialization of their film “In Old Chicago” by filing a set of proof copies with the Copyright Office in January of 1938.<sup>202</sup> This time Fox was prepared to litigate if the application was denied, as it was later that month.<sup>203</sup> A few weeks later 20th Century Fox filed a petition for mandamus in the Washington, DC federal district court.<sup>204</sup> The action “started as a friendly suit but became a real grudge fight” as the suit went on for years.<sup>205</sup>

At trial, Register Bouvé testified, and counsel for 20th Century Fox asked him “where [he] derive[d] authority for refusing registration” of an application for copyright registration because the proper form was not used.<sup>206</sup> In response, Bouvé replied that it was “a pure matter of administration,” and explicated that for the Office’s division of works into different types of forms

[t]here isn’t the slightest necessity in the Act for authority to take that specific step. There are certain powers which are inherent in the Register of Copyrights, or any other officer, administrative officer in any office, which he has seen fit to use and is convenient for everyone concerned to make these different classifications.<sup>207</sup>

Pressed further, Bouvé testified that he was an administrative officer, not just a ministerial officer, and he had been vested with authority to interpret the copyright law in performance of his duties as Register.<sup>208</sup>

However, the court did not agree, and in a terse opinion the district court found that:

[T]he Register of Copyrights. . . has no power to refuse to register any copyright that is entitled to registration under the law. . . any finding of fact or conclusion of law on the part of the Register of Copyrights are not binding upon the court. I think that the powers of the Register of Copyrights are analogous to the powers of the Postmaster General in admitting

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<sup>201</sup> Letter from CLB to Kilroe, (July 3, 1937); *Slave Ship*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Slave\\_Ship\\_\(1937\\_film\)](https://en.wikipedia.org/wiki/Slave_Ship_(1937_film)) (last edited Dec. 5, 2021).

<sup>202</sup> Complaint dated February 17, 1938, in Transcript of Record, *Bouve v. 20th Century Fox*, No. 7741 (D.C. Cir. 1940) [hereinafter Transcript of Record]. *In Old Chicago* was a historical drama set around the Chicago Fire of 1871, and was one of the most expensive films at the time. *In Old Chicago*, WIKIPEDIA, [https://en.wikipedia.org/wiki/In\\_Old\\_Chicago](https://en.wikipedia.org/wiki/In_Old_Chicago) (last edited Dec. 16, 2021).

<sup>203</sup> *Id.* The application was transmitted January 13, and the letter refusing to register was sent January 26.

<sup>204</sup> Petition for Mandamus filed Feb. 17, 1938.

<sup>205</sup> Exploitation: Film Serializations Can Be Protected by Copyright; Test Case Variety (Archive: 1905-2000); May 1, 1940; 138, at 8.

<sup>206</sup> Transcript of Record *supra* note 201, at 124.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

articles in the mail and of the Register of Deeds in recording instruments.<sup>209</sup>

In the eyes of the Court the Register of Copyrights was nothing like the Commissioner of Patents, he was simply a recorder of deeds in intellectual property. The Register of Copyrights timely appealed, and the case moved up to the D.C. Circuit Court of Appeals.

In the brief for the Register of Copyrights, the arguments remain largely the same but honed a bit — the decision by the register was an exercise of his judgment or discretion and cannot be overturned by mandamus, and even the postmaster general, who the district court made an analogy to, makes determination if the material being mailed is validly in the correct class for postage.<sup>210</sup> The brief for 20th Century Fox weighed in at a whopping seventy-six pages, but its approach to the discretion of the Register was fairly straightforward — he had “grasped for and appropriated unto himself the equivalent of the powers granted by Congress unto the Commissioner of Patents.”<sup>211</sup> 20th Century Fox focused on the line in the district court’s opinion, lining up the sections of the Copyright Act with the sections of the provision for a recorder of deeds in the District of Columbia to note their similarity.<sup>212</sup> Given this, they naturally also opposed any suggestion that the court lacked the power to issue mandamus.<sup>213</sup> A short amicus brief was filed by the Standard Music Publishers Association of the United States, taking the straightforward position that the Register of Copyrights had no discretion to deny an application for registration of Copyright.

In 1941 the D.C. Circuit issued its ruling, and held that the Copyright Office had no discretion to deny a claim where the material was within the scope of the copyright law, even if it not within the scope of the Office’s regulations.<sup>214</sup> The decision was on one level a loss for the Register of Copyrights, but the Circuit Court of Appeals drew back some of the more wide-ranging rhetoric from the District Court opinion. In particular, the Court observed that “the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept. The formula which he must apply is a more difficult one than that of the Recorder of Deeds.”<sup>215</sup> The Court noted that all

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<sup>209</sup> U.S. *ex rel.* Twentieth Century-Fox Film Corp. v. Bouve, 33 F. Supp. 462, 463 (D.D.C 1940), *aff’d sub nom.*, Bouve v. Twentieth Century-Fox Film Corp., 122 F.2d 51 (D.C. Cir. 1941). Appellate briefs note that the court presumably meant “Recorder of Deeds.”

<sup>210</sup> Appellant’s Brief. *Bouve*, 122 F.2d 51.

<sup>211</sup> Appellee’s Brief, *id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 65.

<sup>214</sup> *Bouve*, 122 F.2d at 54.

<sup>215</sup> *Id.* at 53.

agreed that the Register “may properly refuse to accept for deposit and registration objects not entitled to protection under the law.”<sup>216</sup> Accordingly, the Register retained authority to reject and thus examine — applications for compliance with the copyright statute, but he could not reject applications merely for failure to comply with office rules. And with that, the *King Features* and *20th Century Fox* cases were complete, as was Register Bouvé’s program of cracking down on attempts to bypass fee requirements.<sup>217</sup> The practice of sending in compilation books of comics would continue into the 21st century,<sup>218</sup> and examination would now be focused on copyrightability.

d) *Brown Instrument Co. v. Warner – Enforcing the Boundaries of Copyright*

In late 1943, the Seventh Circuit Court of Appeals held that technical charts for thermometers were “not the proper subject of copyright.”<sup>219</sup> In response the U.S. Copyright Office, which had previously accepted such registrations, and indeed accepted some 1,200 of them, began to reject copyright applications for these technical charts.<sup>220</sup> The Copyright Office was at this time in some disarray – Register Bouvé was in poor health and would resign at the end of 1943, and of course the nation was in the midst of World War II and many members of the Copyright Office staff left to fight. In lieu of a permanent replacement, Solberg’s former legal assistant Richard C. DeWolf was called out of retirement to assist Bouvé, and with Bouvé’s departure DeWolf — himself aged and ailing — was named acting Register. Perhaps inspired by the recent decisions in the *20th Century Fox* and *King Features* case, the Brown Instrument Company filed an action for declaratory relief and mandamus that the Register of Copyrights

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<sup>216</sup> *Id.* (internal quotation marks omitted).

<sup>217</sup> *King Features* especially filed many volumes of weekly editions following this decision, even though they had been published years earlier. This was facilitated by the U.S. Supreme Court’s decision as these cases were being litigated that an application for copyright was still timely even if filed over a year after publication. *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30 (1939); see also Zvi S. Rosen, *Remembering the Washingtonian Case*, (MOSTLY) IP HISTORY (Sept. 24, 2018), <http://www.zvirosen.com/2018/09/24/remembering-the-washingtonian-case>.

<sup>218</sup> Ray Bottorff, Jr., *4 Thoughts on “NEA Daily and Sunday Comics,”* KREIGH’S COMICS (Dec. 28, 2018, 4:46 AM), <https://kreighscomics.com/2018/06/10/nea-daily-and-sunday-comics/comment-page-1/#comment-330>.

<sup>219</sup> *Taylor Instrument Cos. v. Fawley-Brost Co.*, 139 F.2d 98, 100 (7th Cir. 1943).

<sup>220</sup> *Brown Instrument Co. v. Sam B. Warner*, Register of Copyrights, No. 9277, Brief of Plaintiff-Appellant at 2-3 (D.C. Cir. 1946).

was required to register their technical charts for copyright on September 8, 1944.<sup>221</sup>

DeWolf had encountered this issue before — in 1928 as Solberg’s legal assistant he had initially declined to register these charts, noting they were essentially blank forms, but because it was decided the Office could not “adjudicate the questions involved,” the Copyright Office accepted the registrations.<sup>222</sup> DeWolf and his reduced staff managed the case, and at the end of April, 1945, Sam Bass Warner joined the Copyright Office as its new Register.<sup>223</sup> In a brief opinion at the very end of 1945, the district court said they saw no difference between this case and the 7th Circuit case, and dismissed the case without any mention of the authority of the Register of Copyrights.<sup>224</sup> However, in their brief *Brown Instruments* made clear they understood that the *Fox* and *King* cases mandated registration where the work was subject to copyright.<sup>225</sup> The opinion of the D.C. Circuit did not explicitly state this, but in affirming the District Court’s dismissal of the action, the Copyright Office and others could see a further affirmation of the lesson from *Fox* — examination and rejection was fine, but it needed to be based in copyrightability, not procedure.

e) The Copyright Office Finds Itself

It has been said about many things, but the beginning of a new era is often in many ways the final phase of the previous era. The 1909 Act was the beginning of modern American copyright law, and its effects — including the decoupling of copyright registration from economic growth, were dramatic. At the same time, in many ways the Copyright Office of the early twentieth century still operated in a fairly informal way more characteristic of the nineteenth century, and it entered a phase of relative slackness in the years following the implementation of the 1909 Copyright Act and then the 1912 Townshend Act that formally included motion pictures within copyright law.<sup>226</sup> The reasons why aren’t documented, but Register Thorvald Solberg had suffered a nervous breakdown shortly before his appointment as Register,<sup>227</sup> and one suspects that the fifteen years of

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<sup>221</sup> Complaint in Joint Appendix, *Id.* The delay was because they were waiting to see if the Supreme Court would grant certiorari in the Seventh Circuit Case, which it declined to do. Letter from Richard C. Dewolf (Apr. 25, 1944), *id.* at 19-20.

<sup>222</sup> Letter from Richard C. Dewolf (Oct. 8, 1928), *id.* at 16.

<sup>223</sup> Order Substituting Sam Bass Warner, *id.* at 28

<sup>224</sup> *Brown Instrument Co. v. Warner*, 68 U.S.P.Q. 41 (D.D.C. 1946), *aff’d*, 161 F.2d 910 (D.C. Cir.), *cert. denied*, 332 U.S. 801 (1947).

<sup>225</sup> Brief of Plaintiff-Appellant 4, *Brown Instruments*, 151 F.2d 910.

<sup>226</sup> Prior to this they were registrable as “paper prints.”

<sup>227</sup> *Waldo Moore, former Associate Register of Copyrights, on the History of the Copyright Office*, YouTube, at 15:30 (May 15, 2018), <https://www.youtube.com/watch?v=YCNwEnkxETM>; see also THORVALD SOLDBERG, COPYRIGHT MISCEL-

work on establishing the office in its modern form and writing the 1909 Act had taken its toll. Solberg was also invested in reforming the copyright law further to have the U.S. join the Berne Convention twentieth it had been his goal for the 1909 Act but he continued to push for it as Register and beyond, and seems to have become a higher priority than examination. Solberg remained as Register until his seventy-eighth Birthday, although it's hard to know whether this was by desire or compulsion, as there was no real retirement plan in those days.<sup>228</sup> Regardless, the last two decades of his administration show a less aggressive approach to the administration of copyright, and even gestures towards substantive examination in the 1920s were typically characterized with Solberg folding and allowing the registration after some hectoring. Solberg's successor, William L. Brown, was of a similar temperament.

Clement Bouvé, on the other hand, despite his comparatively short seven-year tenure as Register of Copyrights, marked a new beginning for the Copyright Office, bringing new vigor and backbone to the Office and forcing the Register's discretion to examine copyrights to be confronted. Bouvé also created both an Examining Division and a Revisory Board at the Copyright Office to consider and review rejections, creating a formal infrastructure for examining copyright.<sup>229</sup>

In a pictorial feature from 1940 in the *Washington Post*, called "Perfecting a Copyright," one can see the Copyright Office beginning to approximate its modern form.<sup>230</sup> The Copyright Office went into relative stasis during World War II, with several staff on leave for the war effort,<sup>231</sup> but when they returned, the Copyright Office was poised to enter the post-war era with renewed vigor.

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LANY (1939), <https://archive.org/details/SolbergCopyrightMiscellany/page/n7/mode/2up>.

<sup>228</sup> Solberg lived to be ninety-seven, and was writing on matters including the desirability of joining the Berne Convention after his retirement. *Thorvald Solberg, 1897-1930*, COPYRIGHT.GOV, <https://www.copyright.gov/about/registers/solberg/solberg.html> (last visited Jan. 31, 2022). Waldo Moore mentions in his talk on the history of the copyright office the lack of retirement benefits.

<sup>229</sup> In another memorable turn of a phrase, Bouvé described the Office's Examining Board which made an initial determination of registrability as being "largely lynx-eyed young ladies of a conscientious turn of mind." Clement Bouvé, "*Securing*" of Copyright vs. Registration of Claims of Copyright, 2 ASCAP J. Nos. 2-3 at 5, 9 (1938).

<sup>230</sup> *Perfecting a Copyright*, WASH. POST, Aug. 18, 1940, <https://twitter.com/zvis-rosen/status/1426936750165958656>; U.S. COPYRIGHT OFFICE, ANNUAL REPORT 10 (2020).

<sup>231</sup> The Copyright Office has a flag with one star for each employee who served. Wendi A. Maloney, *Veteran Staffer Visits Copyright Office*, COPYRIGHT NOTICES 16 (May 2011), [https://www.copyright.gov/history/lore/pdfs/201105%20CLore\\_May2011.pdf](https://www.copyright.gov/history/lore/pdfs/201105%20CLore_May2011.pdf).

## 2. 1946-1977 – A Modern Agency at Last

The postwar era was marked by a significant increase in organization and administrative vigor, which finally allowed for more detailed record-keeping and review of applications. The Office was split into various offices, including the Examining, Cataloging, and Reference Divisions, with different responsibilities in the copyright registration process. Each of these divisions also began producing its own annual report for internal use.<sup>232</sup> The discovery of the Examining Division's Annual Reports in particular was part of what enabled this project to exist — beginning in the latter part of the 1950s these reports begin to give detailed information on the statistics of copyright examination — not only how many registrations were being made, but also how many applications had been received, how many had been rejected, and other information including a breakdown of ornamental designs for useful articles registered for copyright in some detail.<sup>233</sup> In addition, we see the Copyright Office maturing into a modern agency during this period, beginning to formalize procedures for copyright examination,<sup>234</sup> leading to the creation of the Compendium of Copyright Office Practices, first published in 1967 and laying out the office's examination practices for the benefit of the public.<sup>235</sup>

### a) Authority of the Register of Copyrights

During this period questions of the Register's authority to examine copyrights continued, although with less fervency in the Courts as the basic rights became established. In the 1954 case of *Mazer v. Stein*, the U.S. Supreme Court issued important guidance on the protectability of consumer products as artworks, explaining that if the work could be conceptually severed and be a freestanding *object d'art* then it could be protected by copyright.<sup>236</sup> In that case the Copyright Office had granted the registra-

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<sup>232</sup> Although mostly internal, these divisional annual reports are available from the Manuscript Division of the Library of Congress, in bound volumes of Library of Congress divisional reports.

<sup>233</sup> Although not engaged here, these include counts of the number of registrations of things like silverware for copyright, year by year.

<sup>234</sup> Arthur Fisher, at the time the head of the Examining Division, issued the first Examining Division manual in 1950. See ARTHUR FISHER § B8. EXAMINATION OF CLAIMS TO COPYRIGHT—A BRIEF HISTORY OF EXAMINATION OF CLAIMS TO COPYRIGHT—1951–1960, reprinted in 8 PATRY, *supra* note 8, App'x B § B8.

<sup>235</sup> UNITED STATES COPYRIGHT OFFICE, COMPENDIUM OF COPYRIGHT OFFICE PRACTICES (1973), <https://www.copyright.gov/history/comp/compendium-one.pdf>.

<sup>236</sup> *Mazer v. Stein*, 347 U.S. 201 (1954). The court's opinion was heavily influenced by the amicus brief filed by the Copyright Office, and thus largely reflected existing Copyright Office practice. Zvi S. Rosen, *The Copyright Office's Amicus Brief from Mazer v. Stein*, (MOSTLY) IP HISTORY (Apr. 26, 2017), <https://zvirozen.com/2017/04/26/the-copyright-offices-amicus-brief-from-mazer-v-stein>.



tions at issue, pursuant to their 1948 regulation that registration of a copyright as artwork “includes works of artistic craftsmanship in so far as their form but not their mechanical or utilitarian aspects are concerned.”<sup>237</sup> In this case the Supreme Court largely accepted and ratified Copyright Office examining process, and likely gave the Copyright Office additional confidence to engage in substantive examination. The Copyright Office filed an amicus brief in this case, explaining that the Office’s examination practices dated back further than 1948, and in fact reflected Office practice since at least 1910.<sup>238</sup>

Following that case a challenge to the general authority of the Register to reject applications for functional works was mounted, and denied by the courts.<sup>239</sup> Celia Fiddler of Dayton had invented a memorabilia record which consisted of a cardboard star with a celebrity’s face on it, and a short transparent one-sided record of the celebrity speaking pasted over it; the piece included cardboard flaps for display.<sup>240</sup> She and her financial backer David Bailie sought to register a copyright in her design for the product as a whole (not the photo or record specifically) in October of 1955, and simultaneously began marketing these from the business Star-Talk, Inc., which they co-owned.<sup>241</sup> However, in December of that year the Examining Division of the Copyright Office communicated its rejection of the application for registration as a work of art, and indicated the photograph itself could be registered on its own.<sup>242</sup> Reconsideration was requested and denied, and in April of 1956 Bailie & Fiddler brought suit in federal court.<sup>243</sup> The District Court heard argument on cross motions for summary judgment, and in September of 1957 dismissed the case without issuing an opinion.<sup>244</sup> The Circuit Court was appealed to, with Bailie & Fiddler arguing that “the Register of Copyrights is a ministerial officer

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<sup>237</sup> 37 C.F.R. 202.8 (1848); LIBRARY OF CONG., DIRECTIONS FOR REGISTERING COPYRIGHTS – COLLECTED – 1866-1956, <https://archive.org/details/1905DirectionsForRegisteringCopyrights6thEd>.

<sup>238</sup> Brief for the Register of Copyrights as Amicus Curiae, *Mazer v. Stein*, 347 U.S. 201 (1953) (No. 228), <https://www.copyright.gov/rulings-filings/briefs/mazer-v-stein-347-u-s-201-1954.pdf>.

<sup>239</sup> *Bailie, v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958). The Copyright Office had also denied such applications previously, for instance rejecting an application to register a doll for copyright as it is a utilitarian object. George Benjamin, *Protection for Dolls*, 25 J. PAT. OFF. SOC’Y 352 (1943).

<sup>240</sup> *Id.*

<sup>241</sup> Complaint, appendix to Appellant’s Brief. *Bailie*, 258 F.2d 125.

<sup>242</sup> Letter from Abraham Kaminstein, Chief, Examining Division, U.S. Copyright Office to Toulmin & Toulmin, Dec. 8, 1955, Exhibit B-2 to Appellant’s Brief, *id.* .

<sup>243</sup> Exhibits B-3, B-5, Complaint. *id.*

<sup>244</sup> Order, Appendix to Appellant’s brief at 40, *id.* . Applications for both design (no. 38,467, filed Oct. 20, 1955) and utility (no. 540,818, filed Oct. 17, 1955) patents were made, but had not been granted as of that point. Answer at 10a.

who must record the claim of material for copyright,” and evaluation of the validity of copyrights was reserved for the courts.<sup>245</sup> However, the Circuit Court affirmed the dismissal in four paragraph opinion, taking the possible dicta in *Bouvé v. Fox* that the Register has authority to deny registration when the work in question is not protectible by copyright, and making it central to the court’s holding.<sup>246</sup> The Register’s authority to examine copyrights was finally on stable legal footing.

Shortly after this, another dispute showcased the internal operations of the Copyright Office, where an attempt to register copyright in a book somehow involved the FBI, ACLU, and Attorney General.<sup>247</sup> In 1941, Register Bouvé in his annual report noted that in the view of existing authorities “seditious, blasphemous, immoral or libelous” works were not subject to copyright.<sup>248</sup> He noted that the Office lacked the resources to conduct a detailed check of each work, but that such works which were facially objectionable were denied registration.<sup>249</sup> This policy would pro-

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<sup>245</sup> Appellant’s Brief at 8., *Bailie*, 258 F.2d 125

<sup>246</sup> *Bailie*, 258 F.2d at 425. By this point it seems that Bailie had lost faith in the items, and they were unloaded as giveaways to teenage members of the Lane Bryant “Chub Club.” *Disk Stars Promote for Dress Chain*, BILLBOARD, July 15, 1957 at 25. <https://books.google.com/books?id=PIEAAAAMBAJ&pg=PA25&dq=%22star-talk,%22&hl=en&sa=X&ved=2ahUKEwiUkrXI6qHxAhX3CTQIHRjCAv4Q6AEwBHoECAIQAg#v=onepage&q=%22star-talk%2C%20inc%22&f=false>.

<sup>247</sup> Adapted from Zvi S. Rosen, *Tam, The First Amendment, and Copyright*, (MOSTLY) IP HISTORY (June 29, 2017), <http://zvirosen.com/2017/06/29/tam-the-first-amendment-and-copyright>.

<sup>248</sup> UNITED STATES COPYRIGHT OFFICE, FORTH-FOURTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 29-31 (1941), <https://www.copyright.gov/reports/annual/archive/ar-1941.pdf>. He also noted that given that sending such material through the mail was criminal anyway, it would pose a ridiculous situation for the Office to accept it. Of course, this also suggests why the issue discussed in this section had not come up sooner. The criminal penalties for obscenity, much more commonly applied than today, meant that for modernist authors like James Joyce they would only be able to find printers in Europe, leaving them unable to claim copyright in the United States and thus unable to comply with the manufacturing clause of U.S. Copyright Law. ROBERT SPOO, WITHOUT COPYRIGHTS (2013). Some of these works would eventually be restored to U.S. Copyright under the 1994 Uruguay Round Agreement.

<sup>249</sup> *Id.* A number of cases had held at this point that “[t]o be entitled to be copyrighted, the composition must be original, meritorious, and free from illegality or immorality.” *Hoffman v. Le Traunik*, 209 F. 375, 379 (N.D.N.Y. 1913). This tradition went back at least as far as 1867, and likely further informally. *Martinetti v. Maguire*, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9,173). (Considering a show where the “principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress” and holding that not only was it not entitled to copyright under the statute, the Constitution does not provide for its protection by copyright.). See also Eldar Haber, *Copyrighted Crimes: The Copyrightability of*

ceed for decades, but finally be challenged in the late 1950s when the Copyright Office received an application from Lawrence E. Gichner, owner of a sheet metal company and amateur sexologist, for his book *Erotic Aspects of Chinese Culture*.<sup>250</sup> Concerned the book may have been obscene, the Copyright Office referred the matter to the Department of Justice, who in turn referred it to the local police in Washington, D.C., where Gichner lived.<sup>251</sup> The D.C. police sent eleven detectives from its Morals Division, who seized “fifty crates full of erotic literature from every corner of the globe.”<sup>252</sup>

Following this, the Librarian of Congress asked the Attorney General if the Copyright Office should do the same in the future.<sup>253</sup> In reaching his determination that they should not, the Attorney General wrote that:

The Register’s authority to deny registration of a claim to copyright in the circumstances envisaged is not clear, but I do not conclude that he is without such power. However, I do conclude that the Copyright Law . . . imposed no duty upon him to deny registration of such claims. If it is decided that the Copyright Office is not equipped to undertake the administrative task involved in a policy of attempting to deny registration of claims to copyright in works of the type here involved or that as a matter of policy it should not, it is not legally required to undertake such task.<sup>254</sup>

Having determined that with only thirty-five examiners and over 1,000 applications for registration coming in a day it would be impractical for the Office to deny registrations for immoral content, and based on concerns of causing a prior restraint on protected speech, the Attorney general decided that the Copyright Office was not required to examine applications for immoral or obscene content.<sup>255</sup> The Attorney General sidestepped the question of whether the Office was constitutionally permitted to deny applications that otherwise within the copyright statute.<sup>256</sup>

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*Illegal Works*, 16 YALE J.L. & TECH. 454 (2014) at 10-11; Dan W. Schneider, *Authority of the Register of Copyrights to Deny Registration of a Claim to Copyright on the Ground of Obscenity*, 51 CHI-KENT L. REV. 691 (1975).

<sup>250</sup> For another account of this, relying on substantial nonpublic material, see § 3:44. Immoral or obscene works—Early Copyright Office views, 2 PATRY, *supra* note 8, § 3:44.

<sup>251</sup> *Id.*

<sup>252</sup> MELISSA ADLER, *CRUISING THE LIBRARY: PERVERSITIES IN THE ORGANIZATION OF KNOWLEDGE* 68 (2017).

<sup>253</sup> 41 Op. Atty. Gen. 395 (1958), <https://babel.hathitrust.org/cgi/pt?id=OSu.32437000654208&view=1up&seq=429&skin=2021>.

<sup>254</sup> *Id.* at 396

<sup>255</sup> *Id.* at 402.

<sup>256</sup> Mr. Gichner’s materials were returned, and charges had been dropped at this point. James E. Clayton & William Burden, *Gichner Erotica Ordered Returned, Case Dropped*, WASH. POST & TIMES HERALD, Sept. 19, 1958, at D1. Gichner

In light of this, the Copyright Office announced it would “continue the policy of limiting its examination to the statutory requirements of the copyright law, and will register all works which meet such standards.”<sup>257</sup>

A few years earlier in 1955, the gears began turning on what would become the 1976 Copyright Act. Congress asked the Copyright Office to prepare a series of “Revision Reports” which would effectively describe copyright law up to that point, and these studies were produced through 1960.<sup>258</sup> But the plan hit a snag when the Copyright Office asked renowned copyright scholar Benjamin Kaplan to prepare a report on copyright registration, and he produced a report in August of 1958 which was somewhat equivocal regarding the Office’s authority to examine and reject applications for the copyright registrations.<sup>259</sup> In response, the Copyright Office prepared an additional study making the case for its authority to examine applications for copyright registration,<sup>260</sup> and coupled with the *Bailie* decision, examination was not seriously challenged again. Also at this time the Second Circuit Court of Appeals ruled that an accepted application for copyright registration was required to bring a copyright suit; rejected applications were insufficient, giving added importance to examination.<sup>261</sup>

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would subsequently be convicted of obscenity for the same work in 1964. *Gichner Convicted in Obscenity Case*, WASH. POST & TIMES HERALD, June 13, 1964 at B3.

<sup>257</sup> *Copyright Office Not to Censor Material*, BILLBOARD, June 8, 1959, at 7, [https://www.archive.org/details/bub\\_gb\\_DSAAEAAAAMBAJ/page/n5/mode/2up](https://www.archive.org/details/bub_gb_DSAAEAAAAMBAJ/page/n5/mode/2up).

<sup>258</sup> UNITED STATES COPYRIGHT OFFICE, STUDIES 1 TO 34, Copyright.gov, <https://www.copyright.gov/history/studies.html>; STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION, at x-xi (Comm. Print July 1961), [https://www.copyright.gov/history/1961\\_registers\\_report.pdf](https://www.copyright.gov/history/1961_registers_report.pdf).

<sup>259</sup> STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION 27-28 (Comm. Print 1960), <https://www.copyright.gov/history/studies/study17.pdf>. One might think from the report that followed that Kaplan repudiated the Office’s authority to examine applications, but in truth his section is fairly delicate and does not take such a specific position, even if he put in a footnote that “some of the general determinations [of the Copyright Office regarding copyright law] may proceed on interpretations of the law which are more restrictive than a court ‘might reasonably’ adopt.” *Id.* at n. 65.

<sup>260</sup> STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDY 18: AUTHORITY OF THE REGISTER OF COPYRIGHTS TO REJECT APPLICATIONS FOR REGISTRATION (Comm. Print 1960), <https://www.copyright.gov/history/studies/study18.pdf>. A reader of Study 18 will note that the ground it covers is largely covered in this piece as well, and thus I have avoided a lengthy discussion of it.

<sup>261</sup> *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958). This was over a dissent from Chief Judge Clark, who argued that “the Register must carry out the provisions of the law and has no judicial or discretionary functions.” *Id.* at 645.

For the two decades following this, until the 1976 Copyright Act went into force in 1978 replacing the 1909 Act, the Copyright Office examined applications at steadily increasing volumes. The Office tended to be cautious with its authority, for instance at first declining to register computer programs but eventually accepting them in 1964, with the Register's comment that although he wasn't sure computer programs were properly the subject matter of copyright, all questions would be resolved in favor of the applicant.<sup>262</sup> On the other hand, the Copyright Office held firm in cases where there was clear statutory authority for its position, for instance refusing to register a book published in France which failed to comply with the Office's regulations for registration of foreign English-language publications.<sup>263</sup> The examination process took a major step towards formalization with the publication of *The Compendium of U.S. Copyright Office Practices* — revising and expanding the Examining Division manual and making it publicly available.<sup>264</sup> With the authority of the Register to conduct examination established, it went without much controversy for much the rest of this period.<sup>265</sup> The one exception would occur in the twilight of the 1909 Act, following the U.S. Supreme Court's decision in *Buckley v. Valeo*, which held that legislative appointment of members of the Federal Election Commission violated the separation of powers doctrine of the Constitution.<sup>266</sup>

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<sup>262</sup> Zvi S. Rosen, *Fifty-Five Years of Software Copyright, (MOSTLY) IP HISTORY* (May 19, 2019), <http://zvirosen.com/2019/05/19/fifty-five-years-of-software-copyright>.

<sup>263</sup> This was upheld by the D.C. Circuit, which ruled that this “regulation is not only not inconsistent with the pertinent sections of the Copyright Code, but in our judgment it accurately reflects the intention of Congress.” *Hoffenberg v. Kaminstein*, 396 F.2d 684, 685 (D.C. Cir. 1968). They continued that “[e]ven if there were some doubt, we would be required to resolve that doubt in favor of the Register's interpretation.” *Id.*

<sup>264</sup> *Prior Editions of the Compendium of U.S. Copyright Office Practices*, COPYRIGHT.GOV, <https://www.copyright.gov/comp3/prior-editions.html> (last visited Jan. 31, 2022).

<sup>265</sup> Cases from this period were generally focused on whether or not denial of registration was appropriate, not on the Register's discretion. *See, e.g., Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978) (interpreting 1909 Act and Copyright Office regulations to uphold the denial of the Copyright Office's denial of registration for lamps that the registrant asserted were also modern art). Zvi S. Rosen, *Thomasville v. Kaminstein – Copyright in Furniture, (MOSTLY) IP HISTORY* (Oct. 31, 2018), <http://www.zvirosen.com/2018/10/31/thomasville-v-kaminstein-copyright-in-furniture>.

<sup>266</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* was decided on January 30, 1976 but had been in the air for a while already at this point — some of the subsequent dates are from before the case was actually decided. *Buckley* is better remembered for its holdings regarding campaign finance law, which are beyond our scope here.

Seeing this case looming, longtime copyright lawyer E. Fulton “Buddy” Brylawski, Jr. began exploring the long-submerged question of the legitimacy of the Copyright Office in modern constitutional law, and as such the authority of the Register of Copyrights to engage in non-ministerial activities like examining claims for registration on a substantive basis.<sup>267</sup> After all, while the Librarian of Congress was chosen by the President he or she was a Congressional officer, and the Register of Copyrights was in turn appointed by the Librarian of Congress (as he or she is today). In a case involving the denial of copyright registration for a typeface design, Brylawski found his opportunity to argue that the Register lacked authority to examine registrations pursuant to the Separation of Powers doctrine.<sup>268</sup> However, the Court held that the Copyright Office is an executive office, operating under the direction of an Officer of the United States and as such is operating in conformity with the Appointments Clause.<sup>269</sup> Although that conclusion has remained controversial,<sup>270</sup> it has been accepted by the Courts.<sup>271</sup>

b) Statistics of Copyright Examination 1947-1977

As the Copyright Office began assembling the Revision Reports in the latter 1950s, statistics of Copyright Office examination activity were needed. These statistics were not reported in the annual report of the Register of Copyrights, but were included in the annual reports that the Examining Division transmitted to the Register. The Examining Division’s annual reports were never per se released to the public, but are available through the Library of Congress’s Manuscript Division in the Library of Congress Archives, part of a collection of bound volumes of Library divisional reports.<sup>272</sup> These reports began supplying statistics of

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<sup>267</sup> E. Fulton Brylawski, *Copyright Office: A Constitutional Confrontation*, 44 GEO. WASH. L. REV. 1 (1975). Despite the 1975 date the opening of the article discusses the Supreme Court’s decision in *Buckley v. Valeo*, so it was presumably published in early 1976.

<sup>268</sup> *Eltra Corp. v. Ringer*, 579 F.2d 294, 300 (4th Cir. 1978).

<sup>269</sup> *Id.* at 301.

<sup>270</sup> Andy Gass, *Considering Copyright Rulemaking: The Constitutional Question*, 27 BERKELEY TECH. L.J. 1047, 1059 (2012).

<sup>271</sup> *Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d 25, 43 (D.D.C. 2010).

<sup>272</sup> I became aware of these reports while serving as the Abraham L. Kaminstein Scholar in Residence at the Copyright Office and seeing occasional copies of these reports in various places in the Office. Once I became aware of them George Thuronyi at the Office of Public Information and Education pointed me to the Manuscript Division of the Library for the complete archive (at least to 1982). Without this I can’t imagine I would have learned about this source of information, or that it has (at least theoretically) been available to the public for decades. I’ve uploaded those reports, *Copyright Examining Division Annual Reports*, which I scanned in full here: [https://archive.org/details/USCO\\_Examining\\_Reports](https://archive.org/details/USCO_Examining_Reports).

copyright examination beginning in 1955, with topline numbers also supplied in 1957 and 1958. Even before these statistics were being regularly supplied, though, certain essential elements of copyright registration were obvious internally.

The miscellaneous classes which account for only 14.5% of the registrations have 33% of the rejections. Periodicals which account for 26.5% of the registrations have only 3% of the rejections. The total number of rejections [being] 8,544 was 3.2% of the total number of claims examined. The total number of cases on which other correspondence was necessary [was] 27,626, [which] amounted to 10.5% of the total. These figures change surprisingly little from year to year.<sup>273</sup>

These observations can be confirmed starting in 1959. As the process of creating revision reports was nearing a conclusion, the annual reports of the Examining Division provide full statistics of works registered without correspondence, works registered following correspondence, and rejected applications, organized by class. The Examining Division continued to provide these statistics in its annual reports to the Register of Copyrights through the end of the era for the 1909 Act in 1977. Previously unknown outside of a few Copyright Office employees, these statistics tell us the story of the Copyright Office's examination practices at a large scale.

Collating these basic statistics of copyright examination in this period allows us for the first time to see what percentage of works were being rejected, and which works required correspondence with the examiner before they could be registered. The percentages are remarkably stable for the entire period, with an average of 2.56% being rejected and 11.89% requiring correspondence before being accepted for registration. Yearly rejection percentages in particular are incredibly consistent.

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<sup>273</sup> ANNUAL REPORT, U.S. COPYRIGHT OFFICE EXAMINING DIVISION FOR THE FISCAL YEAR ENDING JULY 1, 1955, at 7. Miscellaneous classes mean graphical works and the like.

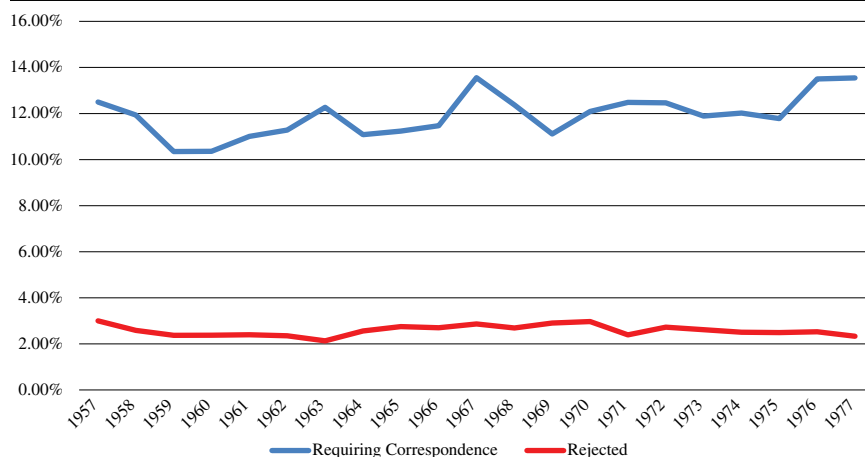


Figure 4- Irregular Applications 1957-1977

However, these steady percentages hide much greater variability once applications for registration are broken down by class, showing how different types of works fared in the examination process. For 1959-1977 works were broken down into about twenty different classes, but in 1978 the number of classes was reduced to three main forms,<sup>274</sup> and using this post-1978 taxonomy on rejection rates highlights differences among types of works. The rejection rate of textual works averages 1.85%, reflecting an average rejection rate of .58% for Class B (periodicals — the lowest of any class), and 2.9% for Class A, a mix of books, printed ephemera, and computer programs. The higher rate for Class A likely reflects the heterogeneity of the class. Performing works are even lower, being rejected 1.23% of the time, with that number kept down by music — the most numerous class of all — being only rejected 1.1% of the time, while movies and drama were rejected somewhat but not notably more at 2.13% and 3.75% respectively. Quite in contrast, over 9% of applications for registration of copyright in visual arts were rejected during this period, as shown below.

<sup>274</sup> For purposes of clarity, I'll be referred to pre-1978 classifications as classes, and post-1978 classifications as forms. The main forms post-1978 were Forms TX, VA, and PA. Sound Recordings (SR), Renewals (RE), and a few other rarer forms are also used post-1978.



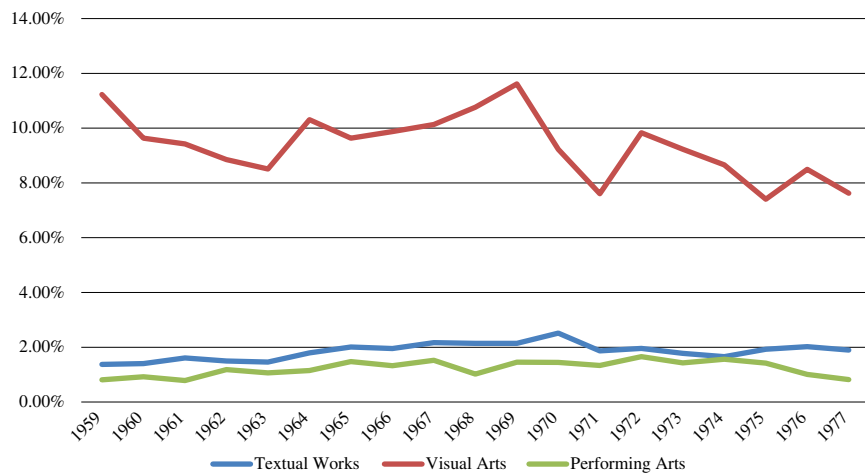


Figure 5- Applications not Registered 1959-1977 – Post-1978 Forms

Breaking down select component classes of visual arts shows just how high rejection rates were for some classes of visual art (Form VA in post-1978 nomenclature — note the different scale at work here):

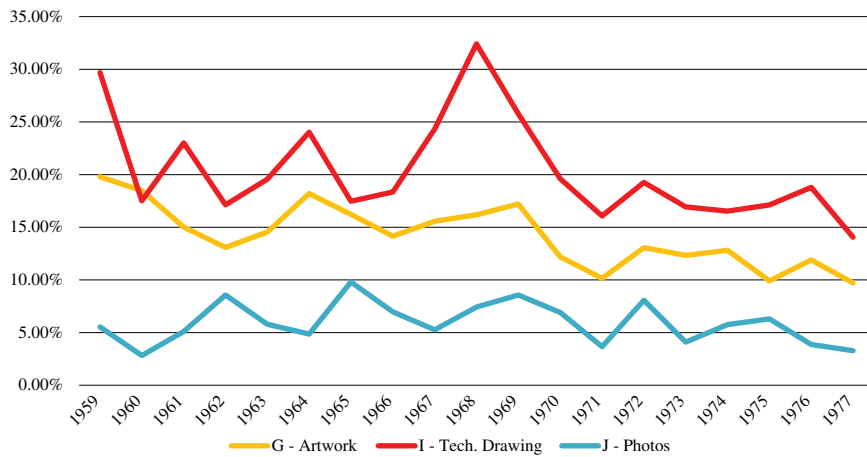


Figure 6 - Applications not Registered 1959-1977 – Selected Form VA Equivalent Classes

The rejection rates for some of these works are far higher than for other types of works, even more than the overall average of 9.37% for visual arts generally — one in every five applications to register technical drawings was rejected, as were a very substantial number of applications

to register visual artwork. On the other hand, the rejection rate for photos is substantially lower than the rate for visual arts generally.

*Table 2 - Averages for Rejection Rates for Form VA (Equivalent) 1959-1977*

F – Maps	1.95%
G – Artwork	14.24%
H – Reproductions of Fine Art	4.30%
I – Technical Drawings	20.40%
J – Photos	5.93%
K – Commercial Illustrations	8.19%
KK – Commercial Prints and Labels	8.50%

One suspects that in a great number of cases technical drawings may have been submitted in an attempt to get a pseudo-patent for a design of invention via copyright law, a problem from the days of patent medicines in the early nineteenth century. Likewise, for artwork, protection might be attempted for what is more properly a trademark, or simply lacking sufficient creativity. This is supposition, though, in lieu of more granular data from this period. Sadly, such data would be extremely difficult to produce as individual copyright rejections were neither published nor cataloged — we are forced to rely on litigation for glimpses of individual examples. One exception to this is the annual report of the Examining Division for the 1960 Fiscal Year, which studies rejections made for each type of work and provided that information in some detail – with a table for all registrations and then with breakdowns by type of work.

Table 3 - Grounds for Rejection, FY1960

Ground for Rejection	Average Number of Rejections per Month	Percentage of all Rejections
Notice	189	34%
No copyrightable matter <sup>275</sup>	149	27%
Unpublished manuscript or outline	97	17%
Blank forms	30	6%
Duplication	24	4%
Reprints	20	4%
Ideas, systems, methods, etc.	18	3%
Devices	14	3%
Utilitarian articles only	8	1%
Miscellaneous <sup>276</sup>	8	1%

This picture of what was being registered is somewhat misleading though, in that these rationales were not evenly distributed. For books, for instance, 14% were characterized as being no copyrightable matter, with another 4% of rejections being for ideas or methods.<sup>277</sup> For books the main problem was failure to comply with formalities, including notice problems and attempting to register unpublished works.<sup>278</sup> The most common rationale for rejection of music applications — in over 60% of cases — was that the music was unpublished. However, the situation was the reverse for PGS works,<sup>279</sup> where 60% of rejections were because the work had no copyrightable subject matter, while only a minority were for notice problems and other issues of formalities.

These statistics show the copyright office developing a rigorous examination system to a degree previously not discussed in the literature. The Copyright Office also made moves to create efficiencies in staffing, for instance creating the role of Copyright Technician to screen applications

<sup>275</sup> (De minimis, familiar symbols or designs, titles, slogans, names, typography, lettering, coloring, etc.)

<sup>276</sup> (Recordings, manufacturing clause, no copyright relations, etc.)

<sup>277</sup> Another 12% were for blank forms, which are arguably also rejections based on subject matter.

<sup>278</sup> This is even more true for periodicals, where the only rationale noted for rejections was lack of notice.

<sup>279</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 40: COPYRIGHT REGISTRATIONS FOR PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS. <https://copyright.gov/circs/circ40.pdf>.

between obvious grants and possible problems (which would be referred to examiners).<sup>280</sup> The Office was also an early adopter of technology, using computers as early as 1972 to catalog registrations with its COPICS system.<sup>281</sup> As the Office entered the computer age, and the United States entered the Berne Convention, many issues from the past would remain, even as in other ways the Office came into its own.

*E. 1978-Present – A New Era, New Challenges*

The Revision Reports discussed *supra* were the first step of the post-war push for a revised copyright law, one designed to fit the looming information age and finally integrate the United States with the world.<sup>282</sup> Although it wasn't a focus per se, a section which would finally codify the authority of the Copyright Office to examine claims for copyright was needed.<sup>283</sup> In 1961 the Register of Copyrights produced a report with recommendations for the new law, which suggested that

The Register of Copyrights should be required to make registration of any copyright claim that appears to be valid, upon deposit of the prescribed copies, application, and fee. His authority to refuse registration of any claim he finds invalid, subject to review by the courts, should be stated expressly.<sup>284</sup>

That language largely tracked the state of the law at the time, in phrasing the duty of the Register of Copyrights as ministerial, but giving him discretion to refuse where he believed the claim was invalid under substantive copyright law. However, in 1963 a more progressive version of the section regarding copyright examination was proposed:

(a) When, after examination, the Register of Copyrights determines that the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, he shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

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<sup>280</sup> LIBRARY OF CONGRESS, 73D ANNUAL REPORT OF THE REGISTRAR OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 1970, at 5 (1971), <https://www.copyright.gov/reports/annual/archive/ar-1970.pdf> at 5; e-mail from Jodi Rush.

<sup>281</sup> U.S. Copyright Office, *US Copyright Office Automated Cataloging Input System*, YOUTUBE (Dec. 5, 1979), <https://www.youtube.com/watch?v=Q0QLaL5804Q>.

<sup>282</sup> Revision Study 1 gives the whole history of prewar efforts, which date back essentially to the passage of the 1909 Law.

<sup>283</sup> This part relies on § 410 of the invaluable Kaminstein Legislative History project, which tracks the complete history of the 1976 Copyright Act.

<sup>284</sup> Report of Register of Copyrights on the General Revision of the U.S. Copyright Law (Tentative Draft) at VII.B.3. (1961) [hereinafter Report of Register Tentative Draft].

(b) In any case in which the Register of Copyrights determines that the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, he shall refuse registration and shall notify the applicant in writing of the reasons for his action.<sup>285</sup>

A reader familiar with the copyright law will immediately recognize these as the first two parts of the modern 17 U.S.C. § 410, with only minimal differences. From here on in, the changes would be subtle — “in accordance with the provisions of this title” was added before “determines” in each section in a 1965 draft.<sup>286</sup> In 1976 the House Judiciary Committee replaced “he” with “The Register,” no doubt inspired by the fact that Barbara Ringer had been Register of Copyrights for three years at that point.<sup>287</sup> The first half of § 410 was thus enacted in that form, and has not been amended since.

As a result of § 410, examination was no longer on shaky statutory ground. The 1909 Act made clear that registration was ministerial, made no mention of rejection of copyright claims by the Register, and a general authority to promulgate “rules and regulations for the registration of claims to copyright” was the only authority for examining and rejecting claims. The 1976 Act, by contrast, provided a specific framework for examination and rejection. Examination would be for (a) copyrightability and (b) compliance with the statute. An application could be rejected if (a) the work was uncopyrightable or (b) the application was otherwise invalid.<sup>288</sup>

The 1976 Act made another key change — registration was no longer required to bring a copyright infringement lawsuit — a denial of registration was now acceptable as well.<sup>289</sup> The current statute follows the recommendation of the 1961 Register’s Report, which urged that “where the procedural requirements for obtaining registration have been fulfilled and the Register of Copyrights refuses registration, the claimant should be entitled to bring an infringement suit if the Register is notified and permitted to become a party to the suit.”<sup>290</sup> Accordingly, while a registration re-

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<sup>285</sup> 1963 Draft Bill in Kaminstein Legislative History Project, subsequently proposed as S. 3008 (also, H.R. 11947 (7/20/64); H.R. 12354 (8/12/64), identical bills), 88th Cong., 1st Sess. (1964).

<sup>286</sup> H.R. 4347 (27) (as introduced). Also, S. 1006 (2/4/65) (28); H.R. 5680 (3/2/65) (31); H.R. 6831 (3/26/65) (33); H.R. 6835 (3/27/65) (34) identical bills], 89th Cong., 1st Sess. (1965)

<sup>287</sup> S. 22, 94th Cong. (1976) (as reported out by Committee on Judiciary). “His action” also became “such refusal,” using passive voice to reach gender neutrality.  
<sup>288</sup> In addition, in a procedure formalized in 1985, a completed registration can also be cancelled. Cancellation of Completed Registrations, 50 Fed. Reg. 40,833 (Oct. 7, 1985).

<sup>289</sup> 17 U.S.C. § 411(a).

<sup>290</sup> Report of Register Tentative Draft, *supra* note 284.

mained useful, especially for statutory damages, having an application rejected was not fatal to enforcing the copyright — only not filing an application for registration (and waiting for a result) would prevent one's ability to enforce a copyright claim. As a result, the incentive to directly challenge the Register's decision — and their authority to make it — was dramatically reduced. Indeed, while the deposit requirements of the law have been challenged,<sup>291</sup> the authority of the Register to examine copyrights under the constitution has not been, at least to a reported decision, since *Ringer v. Eltra* under the 1909 Act.<sup>292</sup>

Instead, questions of copyright registration became largely the same as questions of copyright adjudication, focused on copyrightability. Given that many of these cases involved lawsuits by holders of a denied registration application, the Register of Copyrights was a party to many of these actions pursuant to 17 U.S.C. § 411(b). In case after case, courts made clear that the Register's decision to reject an application was proper unless it was an abuse of discretion, and generally found that the decisions of the register were not abuses of discretion.<sup>293</sup> On the other hand, then-Judge Ruth Bader Ginsburg, writing for the D.C. Circuit Court of Appeals, found that it was an abuse of discretion to refuse to register the “Break-out” computer game.<sup>294</sup> Courts have also made clear that it will be an abuse of discretion if the Register fails to “intelligibly account for [his or her] ruling” or if her decision is not the product of “reasoned decision making.”<sup>295</sup>

With copyright examination now explicitly written into copyright law, challenges to the practice on a statutory basis were impossible. Constitutional challenges were technically possible, but in a case involving rejec-

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<sup>291</sup> *Ladd v. Law & Tech. Press*, 762 F.2d 809 (9th Cir. 1985); *Valancourt Books v. Perlmutter*, 554 F. Supp. 3d 26 (E.D. Va. 2021) Case No. 18-cv-01922-ABJ Docket No. 30 (E.D.VA. July 23, 2021).

<sup>292</sup> There have been occasional odd attempts, such as the failed argument that the Register's regulations for deposit of secure tests violates the statute and constitution. *Nat'l Conf. of Bar Examiners v. Multistate Legal Stud., Inc.*, 692 F.2d 478, 486 (7th Cir. 1982).

<sup>293</sup> *John Muller & Co. v. New York Arrows Soccer Team, Inc.*, 802 F.2d 989, 990 (8th Cir. 1986); *Beverly Hills Design Studio (N.Y.), Inc. v. Morris*, No. 88 CIV. 5886 (LLS), 1989 WL 85867, at \*7 (S.D.N.Y. July 26, 1989); *Homer Laughlin China Co. v. Oman*, No. CIV. A. 90-3160, 1991 WL 154540, at \*2 (D.D.C. July 30, 1991); *Oddzon Prod., Inc. v. Oman*, No. CIV. A. 89-0106, 1989 WL 214479, at \*2 (D.D.C. Oct. 3, 1989), *aff'd*, 924 F.2d 346 (D.C. Cir. 1991) (Upholding refusal to register Koosh ball).

<sup>294</sup> *Atari Games Corp. v. Oman*, 888 F.2d 878, 879 (D.C.Cir.1989).

<sup>295</sup> *Id.*; *see also* *Custom Chrome, Inc. v. Ringer*, No. Civ. A. 93-2634, 1995 WL 405690, at \*3-5 (D.D.C. June 30, 1995); *Jon Woods Fashions, Inc. v. Curran*, No. 85 Civ. 3203, 1988 WL 38585, at \*2-3 (S.D.N.Y. April 19, 1988); *Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 497 (S.D.N.Y. 2005).

tion of copyright registration for a website for appraisers, the 4th Circuit held that copyright rejection was not “contrary to constitutional right” since there is no constitutional right to copyright registration.<sup>296</sup> As such, examination became much more ordinary and uncontroversial of a practice than it had been. As the years pass and we enter the digital era one might hope we finally have proper data on rejections. One may be disappointed.

### *I. Statistics of Copyright Examination 1986-Present*

The Copyright Office had been working on what would become the 1976 Act for almost twenty years and worked a full-scale reorganization of how copyrights were examined in the process. The transition was difficult, with Copyright Office staff under “horrendous pressures. . .in solving one unprecedented problem after another.”<sup>297</sup> Instead of the 20+ previous classes of works, each with their own forms, the Copyright Office created new simplified forms that combined previous classes.<sup>298</sup> Textual works like books, pamphlets, periodicals and speeches were new class “TX,” along with computer programs. Drama, music, and movies were now in class “PA,” while all PGS works were collected into form “VA” for visual arts. Sound recordings, only added to copyright law in 1972, kept their own class — “SR.” This reduced number of forms don’t allow for the same type of discrete breakdowns among types of works that the earlier classes did, but they still tell the same story, just in broader strokes. Due to these and other changes associated with the new law, the Copyright Office went from needing to correspond on 15% or so on applications, to needing to correspond with applicants on 85% of applications.<sup>299</sup> Although that number has gone down since, the Copyright Office never returned to pre-1978 levels requiring correspondence before registration. In 2020, 26% of applications required correspondence, the same as 2019 and a drop from 2018.<sup>300</sup>

The Copyright Office reorganized in 2006, and the Examining and Cataloging Divisions were both folded into what would become the Regis-

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<sup>296</sup> *Darden v. Peters*, 488 F.3d 277, 284 (4th Cir. 2007). Darden had attempted to register the plans for “Appraisers.com” as a map and technical drawing. *Id.*

<sup>297</sup> Statement of Barbara Ringer (quoted in *General Oversight on patent, Trademark, and Copyright Systems: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 96th Cong. (Apr. 9, 1979)) [hereinafter Ringer Statement], [https://www.google.com/books/edition/General\\_Oversight\\_on\\_Patent\\_Trademark\\_an/Cvo7jlgwxVUC?hl=EN&gbpv=1&pg=PA21&printsec=frontcover](https://www.google.com/books/edition/General_Oversight_on_Patent_Trademark_an/Cvo7jlgwxVUC?hl=EN&gbpv=1&pg=PA21&printsec=frontcover).

<sup>298</sup> These forms under the 1976 Act were discussed *supra* where they were used to simplify statistics for 1959-1977.

<sup>299</sup> Ringer Statement, *supra* note 297, at 22-23.

<sup>300</sup> UNITED STATES COPYRIGHT OFFICE, ANNUAL REPORTS (2018-2020).

tration Practice and Procedure (RPP) division, at which point the reports of the Examining Division cease. When I discovered the annual reports of the Examining Division, I naturally assumed they'd form a continuous record up to and through computerization. However, the annual reports of the Examining Division from 1978 on are not available from the Manuscript Division of the Library of Congress. I did eventually find them while at the Copyright Office, but no statistics on application disposition are included. Indeed, I was surprised to learn — as was confirmed by the Copyright Office — that no official figure exists of copyright applications received for 1978-1985.<sup>301</sup> I retain some hope that one day this data will appear, but the cost of reconstructing it would be prohibitive, so for now a seven-year gap in the data is unavoidable.

Statistics for total applications received by fiscal year resume in 1986, showing us the percentage of applications where no registration issued.<sup>302</sup> This number is very imprecise without more context, because it includes both applications which were abandoned following an attempt at correspondence and applications which were actually rejected. This figure is also skewed by years where there was a backlog of works to be examined, most notably 2007-10 when electronic registration was introduced and various issues led to a huge backlog.<sup>303</sup> With those caveats, this is the percentage greater of applications in a year compared to registrations in a year (using three-year averages to smooth the data to account for broader trends).<sup>304</sup>

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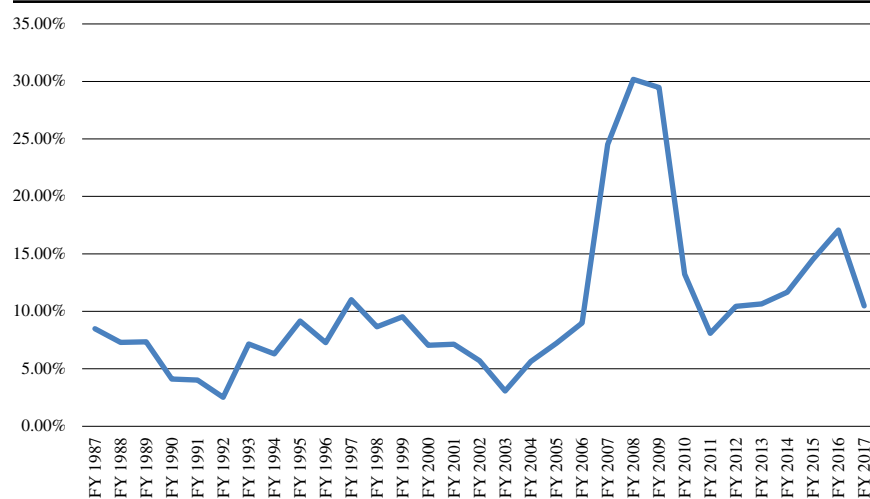
<sup>301</sup> E-mail from Maria Strong, Acting Register of Copyrights to Zvi S. Rosen (Sept. 18, 2020) (copy on file with author). I had previously conferred on this question with John H. Ashley, a longtime employee of the Copyright Office and Chief of the Visual Arts Section, who believed that Ralph Oman had requested data on applications received when he became Register of Copyrights in 1986, and that he (Mr. Ashley) had not been able to find that data at the time.

<sup>302</sup> These numbers are taken by comparing applications and registrations per fiscal year, which can lead to anomalies like a negative number where large numbers of applications from previous years are registered.

<sup>303</sup> *Copyright Office Improves Processing Time and Service*, COPYRIGHT.GOV (May 29, 2009), COPYRIGHT.GOV, <https://www.copyright.gov/newsnet/2009/369.html>.

<sup>304</sup> Negative numbers don't indicate errors, they only indicate more registrations than applications — presumably reflecting a backlog from previous years.





*Figure 7 – Overage of Applications compared to registrations 1987-2017 (3 year averages)*

The average number of applications which did not result in registration during FY 1986-2020 was 9.59%, which seems higher than what one would expect when combining the 2.56% rejections for 1959-1977 with a portion of works requiring correspondence but being abandoned. This statistic is interesting at the most basic level, in showing how many applications do not end up as completed registrations; more granular data would be helpful. I assumed that the different classes would break the same way they do pre-1978, with form VA showing a much higher number of incomplete applications. However, that was not the case — the difference among classes is actually quite modest — I suspect that more numerous abandoned applications following unanswered correspondence wash out most of the differential impacts of rejections across classes.

For the years 2000-2015 I was able to get actual tabulations of rejections from the Copyright Office (as opposed to just applications which haven't been registered) and broke them down by form. I was unsurprised that Form VA comprises the lion's share, confirming that far from breaking down, the outlier status of Form VA for examination has only strengthened.

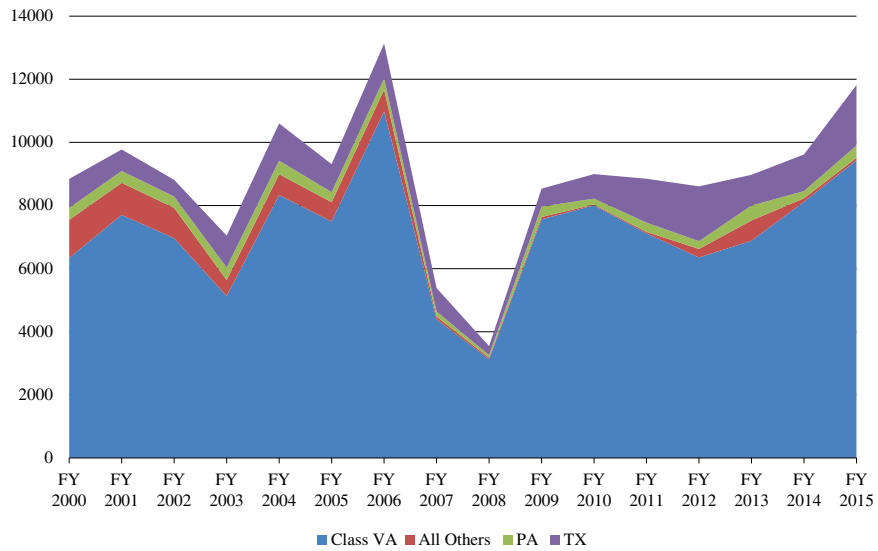


Figure 8 - Copyright Rejections 2000-2015

Even Form TX, with its abundance of ephemera and computer programs, occupies a fairly small number of rejections — the vast majority is Form VA. That same chart for 1959-1977 shows a much more even distribution of rejections numerically, the higher percentage of Form VA rejections is due to fewer overall applications.

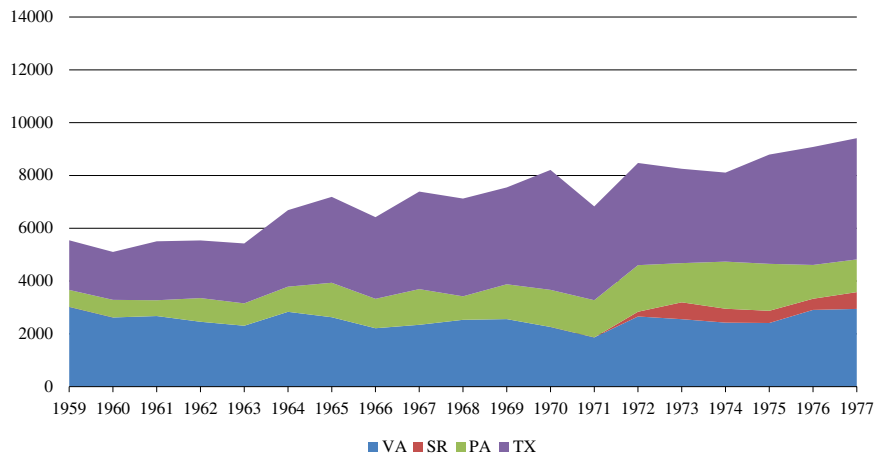


Figure 9 - Number of Rejections 1959-1977 in modern form equivalents

While form VA has always had an unusually high rejection rate, it now occupies the vast majority of rejections, in a way it hasn't before.

This suggests that while rejection rates were higher for visual arts before, the trend has accelerated. That said, it's worth being mindful that the Copyright Office typically handles on the order of half a million applications per year, so these numbers are a comparative drop in the bucket.

## 2. *Reconsidering Registration*

When the United States started its copyright system in 1790 and revised it through the nineteenth century, the main model was the United Kingdom, which operated on a registration model. However, in 1886 many of the leading cultural producers of the world including the United Kingdom signed the Berne Convention, which embraced the French model of copyright protection without the need for formalities like registration. In 1911 the United Kingdom passed a major revision to its copyright laws, the first since 1842, and it brought England in line with the Berne convention.<sup>305</sup> Registration of copyrights at Stationer's Hall, which had been required since England had a Tudor king, was no longer required in most cases.

The United States did not join Berne at the time, and instead passed the 1891 International Copyright Act, allowing foreigners to receive copyright protection in the United States provided the work was printed and typeset in the United States (aka the "Manufacturing Clause").<sup>306</sup> Thorvald Solberg's draft copyright law from 1906 would have brought the United States closer to entering the Berne Convention, including harmonizing the term to life plus fifty years.<sup>307</sup> However, at the Berlin Conference in 1908, which Solberg attended, the Berne Convention was amended to specifically prohibit formalities, including registration and the manufacturing clause.<sup>308</sup> The manufacturing clause was non-negotiable for Congress, and the final 1909 Act kept all major aspects of previous copyright law which were incompatible with Berne, including a more traditional copyright term with renewal and registration formalities.

Over the twentieth century there were repeated attempts to eliminate registration (and examination) and move to a Berne-compatible copyright

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<sup>305</sup> *Copyright Act 1911*, LEGISLATION.GOV.UK, <https://www.legislation.gov.uk/ukpga/Geo5/1-2/46/contents/enacted>.

<sup>306</sup> Act of March 3, 1891, 26 Stat. 1106.

<sup>307</sup> THORVALD SOLBERG, COPYRIGHT BILL COMPARED WITH STATUTES NOW IN FORCE (1906), <https://archive.org/details/TheCopyrightBillComparedWithStatutesNowInForce1906>.

<sup>308</sup> LIBRARY OF CONGRESS, INTERNATIONAL COPYRIGHT UNION: BERNE CONVENTION (1908), <https://babel.hathitrust.org/cgi/pt?id=HVd.32044103234894&view=1up&seq=7&skin=2021>.

law.<sup>309</sup> During the tenure of Col. Bouvé and his successor Sam Bass Warner international agreements were not prioritized, but Warner was removed by librarian Luther Evans in favor of the internationalist Arthur Fisher, leading initially to the Universal Copyright Convention (a treaty with fewer requirements than Berne) and then the 1976 Act under Fisher and his successors Abraham Kaminstein and Barbara Ringer.<sup>310</sup> The 1976 Act made joining Berne seem possible with a switch to a term of life plus fifty, but many of the other formalities remained as obstacles, albeit in weakened form, including requirements of notice, registration, and the manufacturing clause. When the Berne Convention reached its centennial in 1986 the United States had still not joined, but it no longer seemed implausible,<sup>311</sup> and three years later the United States removed the final legal impediments to joining Berne.<sup>312</sup> The version of that bill introduced in the Senate would have also eliminated the requirement of registration prior to initiation of a lawsuit,<sup>313</sup> as it was believed that the provisions of 411(a) were incompatible with Berne.<sup>314</sup> However, the House disagreed and instead kept 411(a) with a carve-out for other Berne nations, believing that under a “minimalist approach . . . section 411 of the Copyright Act should not be changed since it is not clearly prohibited by” Berne.<sup>315</sup> As such, registration and examination remained a prerequisite to suit and statutory damages for works published in the United States, and the question was raised as to whether or not this examination was still serving a purpose.

In the early 1990s, formalities were further removed for copyrights when renewal became automatic for pre-1978 works.<sup>316</sup> As the cascade of reforms continued, Congress considered the Copyright Reform Act of 1993, which once again considered repeal of sections (a) and (b) of 17

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<sup>309</sup> Revision Report 1 chronicles these. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION (Comm. Print 1960), <https://www.copyright.gov/history/studies/study1.pdf>.

<sup>310</sup> Waldo Moore discusses this episode in his talk to the Copyright Office called “Morsels from the Past,” *supra* note 327. Fisher was appointed in 1951, and the Universal Copyright Convention was established under the aegis of UNESCO in 1952. Evans left the Librarianship to become Director-General of UNESCO in 1953.

<sup>311</sup> ARPAD BOGSCH, THE FIRST HUNDRED YEARS OF THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS 23 (1986).

<sup>312</sup> Pub. L. No. 100-568, 102 Stat. 2853 (1988), <https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg2853.pdf>.

<sup>313</sup> S. 1301 § 7. 100th Cong. (1988).

<sup>314</sup> S. REP. 100-352 (1988). These are the sections requiring registration (or rejection) before commencing a lawsuit for infringement.

<sup>315</sup> H. REP. 100-609, at 41 (1988).

<sup>316</sup> Copyright Amendment Acts of 1992, Pub. L. 102-307 (1992).

U.S.C. § 411 as well as § 412.<sup>317</sup> The bill inspired several senators to ask the Register of Copyright whether such a measure would impact the Library of Congress's acquisition needs,<sup>318</sup> but the question of examination was inevitably part of the discussion put to what would become the Advisory Committee on Copyright Registration and Deposit (ACCORD).<sup>319</sup> Somewhat surprisingly, the committee chairs were not concerned that removing § 411 and § 412 would reduce registrations, noting a lack of empirical evidence.<sup>320</sup> ACCORD recommended a study to determine this for Phase 2 of the Commission.<sup>321</sup> However, some felt this sanguinity misplaced, finding it "difficult to believe that voluntary registration would be widely used" without these requirements.<sup>322</sup> On the other hand, Working Paper 4A of ACCORD was concerned that eliminating the need to register would result in an increase in "frivolous claims" and "strike suits."<sup>323</sup> In the end, the contemplated Phase II to ACCORD never took place, and the statutory inducements to registration remained until today. As mentioned *supra*, in 2018 the U.S. Supreme Court confirmed what the Copyright Office had maintained, which is that a registration or rejection, not merely an application, is needed to commence a copyright infringement action.<sup>324</sup> This in turn led to further calls for abolition of the registration requirement, or of registration generally,<sup>325</sup> but this does not seem to have gained much traction.

The "rule of doubt" in Copyright Office practice would also change during this period. The more traditional definition of this rule was that

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<sup>317</sup> H.R. 897, 103rd Cong. (1993), <https://www.congress.gov/bill/103rd-congress/house-bill/897>; S. 373, 103rd Cong. (1993), <https://www.congress.gov/bill/103rd-congress/senate-bill/373>. The bill passed the House but did not go further. Section 412 provides for statutory damages in infringement litigation.

<sup>318</sup> Robert Wedgeworth & Barbara Ringer, *The Library of Congress Advisory Committee on Copyright Registration and Deposit—Letter and Report of the Co-Chairs*, 17 COLUM.-VLA J.L. & ARTS 271 (1993) (transmittal letter dated October 1, 1993).

<sup>319</sup> *Id.*, transmittal letter from Committee Chairs to Librarian of Congress at 2.

<sup>320</sup> Robert Wedgeworth & Barbara Ringer, *The Library of Congress Advisory Committee on Copyright Registration and Deposit—Letter and Report of the Co-Chairs*, 17 COLUM.-VLA J.L. & ARTS 271 (1993) (transmittal letter from Committee Chairs to Librarian of Congress at 1).

<sup>321</sup> LIBRARY OF CONGRESS, ACCORD REPORT 31 (1993).

<sup>322</sup> Pamela Samuelson, *Will the Copyright Office Be Obsolete in the Twenty-First Century*, 13 CARDOZO ARTS & ENT. L.J. 55, 56 (1994).

<sup>323</sup> Working Paper 4A at 140, ACCORD REPORT. *supra* note 319. .

<sup>324</sup> *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

<sup>325</sup> See Tom James, *Copyright Enforcement: Time to Abolish the Pre-Litigation Requirement*, 2019 U. ILL. L. REV. ONLINE (2019), <https://www.illinoislawreview.org/wp-content/uploads/2019/10/James.pdf>.; David R. Carducci, Note, *Copyright Registration: Why the U.S. Should Berne the Registration Requirement*, 36 GA. ST. U. L. REV. 873 (2020).

“the Copyright Office will register a claim even though the Office has a reasonable doubt about the validity of the copyright.”<sup>326</sup> However, during this period the rule as applied would become much more focused on software, as the Copyright Office began issuing registrations for software deposited in object code under the rule of doubt.<sup>327</sup> Under the current (third) revision of the Compendium of Copyright Office Practices, the Office notes that registration under the rule of doubt may be made where the Office is “unable to examine the deposit copy(ies) to determine if the work contains copyrightable authorship.”<sup>328</sup> Nowadays the Copyright Office only “applies the Rule of Doubt in certain very limited situations.”<sup>329</sup> On review of the Copyright Office records it does not seem a registration has been made under the rule of doubt not related to computer programs since 2010.

### 3. *Pendency of Applications*

The period from when an applications was received to when it was approved has varied over time.<sup>330</sup> In the pre-1870 era, applications were generally handled on the same day they were received. However, with the centralization of copyright in the Library of Congress the Librarian was overwhelmed by the volume of applications, and near the end of his tenure in 1893, the Librarian of Congress commented that there was a two month backlog before applications could be processed.<sup>331</sup> The difficulties of handling copyright applications with a limited staff seem to have only increased, leading to missing funds on the Library’s accounts in 1895, which Spofford blamed on “the extreme pressure constantly on the Libra-

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<sup>326</sup> Copyright Reform Act of 1993, H. REP. NO. 103-388 18(Nov. 20, 1993); Morton David Goldberg & Richard Dannay, *Fraud on the Copyright Office: Its Use and Misuse as a Defense in Copyright Infringement Actions*, 44 N.Y.U. L. REV. 540, 557 (1969). (“[A] claim should not be disapproved if there is a reasonable doubt as to its validity (as may ultimately be determined by a court), even though the Office itself may consider the claim invalid-hence the policy of refusing only those claims which are defective on their face.”).

<sup>327</sup> Jon A. Baumgarten, *Copyright Protection of Computer Programs*, 32 Fed. B. News & J. 220, 221 (1985).

<sup>328</sup> COMPENDIUM (THIRD) at 607 (Noting computer object code and works protected by trade secrecy as examples thereof).

<sup>329</sup> Copyright Office Review Board Letter Re: Second Request for Reconsideration for Refusal to Register The Explorer and Forget Me Not; Correspondence IDs: 1-2UQNX9Q, 1-2V2KYPR; SR 1-4000614358, SR 1-4440340247 at 6-7 (May 8, 2019).

<sup>330</sup> By approved I refer to the certificate being issued. Often cataloging would take longer.

<sup>331</sup> *Copyright Office Delays*, N.Y. TIMES, Jan. 12, 1893, at 6, <https://timesmachine.nytimes.com/timesmachine/1893/01/12/106810873.html?pageNumber=6>.

rian in his double office as Librarian of Congress and Register of Copyrights to the whole country.”<sup>332</sup>

With the appointment of a separate Register of Copyrights in 1897, the problem seems to have been tamed,<sup>333</sup> and sixty years later in 1957 the time to registration from an application was 1-2 weeks.<sup>334</sup> Following the passage and implementation of the 1976 Act, the processing time was 5-6 weeks as of 1981, a problem viewed as being worthy of GAO scrutiny.<sup>335</sup> By the new millennium the problem had only grown worse, and in 2001 it took 200 days to process the average application.<sup>336</sup> The problem got better, but with the introduction of electronic registration it got even worse again.

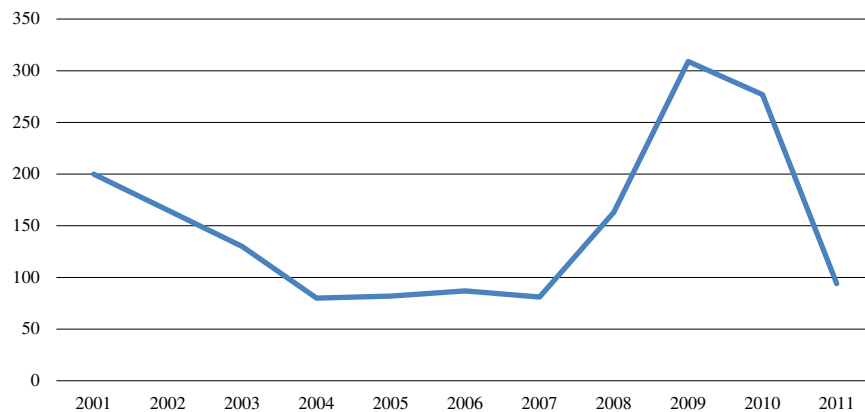


Figure 10 - Registration Processing Times in Days

As seen above (taken from the annual reports for these years), periods of six months to examine a basic registration were not uncommon, and in 2009 the average was 309 days — over 9 months. These delays became an issue as registrants were left waiting to commence copyright litigation

<sup>332</sup> *Mr. Spofford's Shortage*, N.Y. TIMES, Aug. 22, 1895, at 3, <https://times-machine.nytimes.com/timesmachine/1895/08/22/103370000.html?pageNumber=3>.

<sup>333</sup> I'm not aware of any statistics prior to 1957, but the various applications of controversy *supra* were all processed in days or weeks.

<sup>334</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, IMPROVING PRODUCTIVITY IN COPYRIGHT REGISTRATION 3 (Oct. 22, 1982), <https://www.gao.gov/products/afmd-83-13>.

<sup>335</sup> *Id.*

<sup>336</sup> It is likely that the anthrax attacks on the U.S. Capitol, which dramatically delayed mail service to the Copyright Office in 2001, also played a role in delays. UNITED STATES COPYRIGHT OFFICE, ONE HUNDRED FIFTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2002, at 3 (2002), <https://www.copyright.gov/reports/annual/2002/annual-report-2002.pdf>.

until they could receive a registration decision,<sup>337</sup> and some courts began interpreting the copyright laws to allow a copyright infringement suit once an application was filed.<sup>338</sup> The matter eventually reached the U.S. Supreme Court, where the Solicitor General (for the Copyright Office) admitted that the average processing time was seven months and “[n]inety-four percent of all applications right now are resolved within two to fifteen months.”<sup>339</sup> Justice Ginsburg wrote for a unanimous court that a registration grant (or rejection) was needed to commence a copyright lawsuit, but noted that:

[t]rue, the statutory scheme has not worked as Congress likely envisioned. Registration processing times have increased from one or two weeks in 1956 to many months today. Delays in Copyright Office processing of applications, it appears, are attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate, but courts cannot cure. Unfortunate as the current administrative lag may be, that factor does not allow us to revise § 411(a)’s congressionally composed text.<sup>340</sup>

The Copyright Office, noting that the Supreme Court had taken the case, had already been working on reducing registration processing times from 210 days for a basic claim not requiring correspondence in the first half of FY2018 to forty-eight days for the same claim in the second half of FY2020.<sup>341</sup>

#### 4. *Reviewing Copyright Rejections*

In recent years the Copyright Office has begun putting the decisions of its internal review board online, providing a further window in copyright examination policy and procedure.<sup>342</sup> As mentioned *supra*, Register Bouvé created the Revisory Board to review rejections in the 1930s, creating a formal structure for additional layers of review of examiner rejec-

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<sup>337</sup> The Copyright Office offers expedited handling within a matter of weeks for a high fee (currently \$800) which is prohibitive for smaller litigants.

<sup>338</sup> *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F3d 612, 94 U.S.P.Q.2d 1735 (9th Cir. 2010).

<sup>339</sup> Transcript of Oral Argument at 41, *Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (No. 17-571), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2018/17-571\\_7lho.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-571_7lho.pdf).

<sup>340</sup> *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 892 (2019) (internal citations to the above GAO Report and *Patry on Copyright* omitted).

<sup>341</sup> Biyearly statements on file with author or online.

<sup>342</sup> *Review Board Opinions*, COPYRIGHT.GOV, <https://www.copyright.gov/rulings-filings/review-board>.



tions.<sup>343</sup> The Revisory Board was abolished in 1947 with the restructuring of the Copyright Office,<sup>344</sup> and subsequently an applicant could request reconsideration of a denied application,<sup>345</sup> and in theory the Register of Copyrights could review that, but this was rarely done.<sup>346</sup> This persisted for some time, but one provision of the Copyright Reform Act of 1993, discussed *supra* for its proposal to remove §§ 411(a-b) and 412, was the creation of an in-office appellate procedure which would have been enacted in § 410. That bill failed to pass, but spurred on by that bill and the ACCORD Commission, in 1995 the Copyright Office created a formal appeals board consisting of the Register and senior Copyright Office offi-

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<sup>343</sup> In 1941 the Attorney General ruled that review by the Revisory Board was sufficient and the Librarian was not required to provide his own review: 10 Op. Atty. Gen. (1041) <https://babel.hathitrust.org/cgi/pt?id=OSu.32437000654216&view=1up&seq=57&skin=2021>.

<sup>344</sup> PATRY, *supra* note 8, at 1211. The University of New Hampshire School of Law in consultation with the author has received these opinions by FOIA and posted them online. Copyright Advisory Board—Decisions, Memos and Minutes 1937-1945, <https://www.ipmall.info/content/copyright-office-revisory-board-decisions-memos-minutes-1937-1945>.

<sup>345</sup> UNITED STATES COPYRIGHT OFFICE, SIXTY-THIRD ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1960, at 4 (1961), <https://www.copyright.gov/reports/annual/archive/ar-1960.pdf>.

<sup>346</sup> *Id.* A more detailed account was given in the *University of Pennsylvania Law Review*:

Upon receipt of an application for registration, the application form and accompanying deposit are sent to an examiner whose function is to ascertain whether or not a certificate should issue. If the submitted material is clearly copyrightable and if there has been compliance with the other statutory requisites, the certificate will normally be issued as a matter of course. Should a question arise, the examiner will write to the applicant and attempt to secure whatever further information or clarification is needed. If, after examining the deposit and all the pertinent information regarding it, the examiner decides that the material is not copyrightable or that the applicant is not entitled to copyright, the applicant will be notified of the rejection and of the reasons therefor. The applicant may then request reconsideration, in which case the initial decision is reviewed *de novo* by the head examiner of the appropriate section of the Examining Division, who takes into account whatever arguments the applicant advances in favor of acceptance. If the decision is confirmed, further appeals lie to the Assistant Chief and, ultimately, to the Chief of the Examining Division. In rare cases presenting questions of particular importance it may be possible to appeal to the Register, but ordinarily, if the Chief of the Examining Division affirms the initial examiner's denial, the applicant's only recourse lies in bringing an action of mandamus against the Register.

Comment, *The Role of the Register of Copyrights in the Registration Process: A Critical Appraisal of Certain Exclusionary Regulations*, 116 U. PA. L. REV. 1380, 1390 (1968).

cials, or their designees.<sup>347</sup> An applicant can request review by the Review Board following a rejection by making a second request for reconsideration.<sup>348</sup> The written decisions of the appeals board were not published, but the University of New Hampshire School of Law Library received them via Freedom of Information Act request and published them on their IP Mall website.<sup>349</sup> In 2016 the Copyright Office began posting them online, and included tags as to what the legal and subject matter issues of these cases were. Working with my research assistant Justine Newman, we categorized these opinions into the same categories as the Copyright Office used.

An analysis of the 1995-2020 opinions shows that a few major issues dominate the Appeal Board's proceedings. There were 642 review board decisions for this period (406+236), and artwork predominates.

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<sup>347</sup> UNITED STATES COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 1995, at 2 (1996), <https://www.copyright.gov/reports/annual/archive/ar-1995.pdf>. Regan Smith, then the General Counsel of the Copyright Office, published a discussion of some of the most interesting cases before the appeal board. Regan A. Smith, *Curious Cases of Copyrightability Before the Copyright Office*, 43 COLUM. J.L. & ARTS 343 (2020).

<sup>348</sup> *Chapter 1700: Administrative Appeals*, in COMPENDIUM, *supra* note 38, at 1704.1

<sup>349</sup> University of New Hampshire Franklin Pierce School of Law, *U.S. Copyright Office Board of Appeals Decisions*, IP MALL, <https://ipmall.law.unh.edu/content/us-copyright-office-board-appeals-decisions> (last visited Feb. 6, 2023).

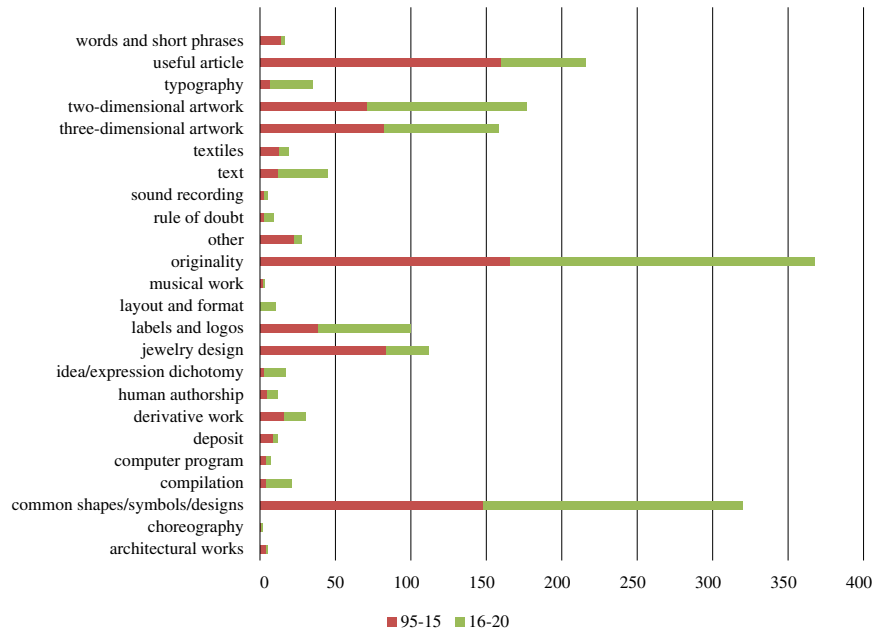


Figure 11 - Appeal Board Decisions – Issues Considered 1995-2020  
(more than one per decision)

Half of the rejections being reviewed involved common shapes, and 57% involved problems of originality (insufficient creativity). Useful articles (typically industrial design) frequently appear, as does typography (typically in logos). This is a self-selected group of applicants who filed a request for consideration by the Review Board, but there is no reason to think this isn't representative of applicants for copyright registration more generally.

Interestingly, an earlier study found that out of the twenty rejections reversed by the appeal board 2016-2020, almost half were textual works, even though textual works are a much smaller percentage of works reviewed by the appeal board.<sup>350</sup> Updating this data through the end of 2020 shows that out of forty-three decisions (of 236 reviewed) that reversed a decision, fully or partially, twelve involved text, so 28%, even though textual works were only 13% of all rejections reviewed. So over a third of rejections involving text were reversed — entirely disproportionate to the 12% of common shape rejections reversed and 3.5% of useful article rejections reversed.<sup>351</sup>

<sup>350</sup> Pottinger & Frye, *supra* note 35, at 14-15.

<sup>351</sup> This is 12/33, 21/172, and 2/56 respectively.

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#### IV. THE FUTURE OF COPYRIGHT EXAMINATION

At a conference on “Copyright in the Twenty-First Century,” held in 1994 immediately following the ACCORD report, Eric Schwartz (then) of the Copyright Office noted that “to state the obvious, we are at the beginning of an enormous revolution in communications, expanding exponentially on the revolution started by the printing press five hundred years ago.”<sup>352</sup> And of course he was correct. Copyright registration likewise changed dramatically with the introduction of electronic registration in 2007.<sup>353</sup> Although, as discussed above, that shift was not without its challenges, in the fiscal year 2020 98% of applications were received electronically.<sup>354</sup> Somewhat surprisingly document recordation is still done via paper documents despite serious attempts over the intervening years,<sup>355</sup> but a pilot program to bring that process into the information age was finally unveiled in FY 2020.<sup>356</sup>

At the same time, copyright examination hasn’t changed all that much. In 2006 the Examining and Cataloging divisions were reorganized into what would become the Office of Registration Policy and Practice.<sup>357</sup> This has led to some change, for instance the “dedicated effort to ensure that Examiners and attorneys in the Office of Registration Policy and Practice explain their reasoning clearly and as specifically as possible.”<sup>358</sup> And yet copyright examination is not really that different from how it was 50 years ago or even a hundred years ago. We’ve now gone through, at some not inconsiderable length, the development and structure of copyright examination in the United States. Armed with that knowledge, what can we do to improve it?

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<sup>352</sup> Eric Schwartz, *Introduction*, 13 *CARDOZO ARTS & ENT. L.J.* 13, 15 (1994).

<sup>353</sup> Soliciting Participation in Electronic Copyright Office (eCO) Beta Test, 73 *Fed. Reg.* 30,641 (June 1, 2007), <https://www.copyright.gov/fedreg/2007/72fr30641.html>.

<sup>354</sup> UNITED STATES COPYRIGHT OFFICE, ANNUAL REPORT 10 (2020) at 10, <https://www.copyright.gov/reports/annual/2020/ar2020.pdf>.

<sup>355</sup> *Recordation and Reengineering*, COPYRIGHT.GOV, <https://www.copyright.gov/docs/recordation> (last visited Feb. 6, 2023).

<sup>356</sup> 2020 ANNUAL REPORT, *supra* note 348. at 6; *Modernization*, COPYRIGHT.GOV, <https://www.copyright.gov/copyright-modernization> (last visited Feb. 6, 2023).

<sup>357</sup> In 2006 these divisions were reorganized into the Registration and Recordation Program. UNITED STATES COPYRIGHT OFFICE, 2006 ANNUAL REPORT at 12 (2007). In 2011 this was shortened to just the Registration Program, which is still what it is called in Review Board opinions. *Copyright Office Announces Program Reorganization*, COPYRIGHT.GOV (May 20, 2011), <https://www.copyright.gov/newsnet/2011/425.html>. The Registration Program became the Office of Registration Policy and Practice in 2017. Copyright Office Technical Amendments, 82 *Fed. Reg.* 9354-01 (Feb. 6, 2017).

<sup>358</sup> Robert Kasunic, *Copyright from Inside the Box: A View from the U.S. Copyright Office Keynote Address*, 39 *COLUM. J.L. & ARTS* 311, 316 (2016)

### A. *Should We Examine?*

Firstly, it's worth talking for a bit about something uncomfortable to talk about as a U.S.-based legal scholar: the rest of the world. And most of the rest of the world either never examined works for copyright protection or stopped doing so long ago.<sup>359</sup> As mentioned above, the United Kingdom mostly stopped examining copyright in 1911.<sup>360</sup> Other countries abolished registration to comply with Berne, for instance Japan's Copyright Law of 1899.<sup>361</sup> A 2010 WIPO study found that 48 nations responded to a survey indicating that they had a voluntary registration system, but the United States registered more copyrights than every single other respondent combined.<sup>362</sup>

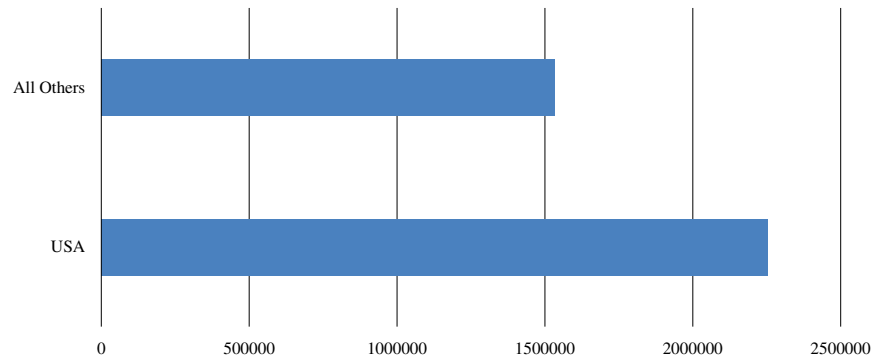


Figure 12 - Copyright Registrations 2005-2009

This same survey reveals that many of these nations conduct an extremely quick registration process which would likely preclude any serious examination — ten process the application the day it is received, three

<sup>359</sup> *Supra* at III.E.2 “Reconsidering Registration.”

<sup>360</sup> *Supra* note 305.

<sup>361</sup> JAPAN PATENT OFFICE, OUTLINE OF THE JAPANESE COPYRIGHT LAW 4, [https://www.jpo.go.jp/e/news/kokusai/developing/training/textbook/document/index/Copyright\\_Law.pdf](https://www.jpo.go.jp/e/news/kokusai/developing/training/textbook/document/index/Copyright_Law.pdf). Japan does have a limited registration system today, but it is not mandatory.

<sup>362</sup> World Intellectual Property Organization, WIPO Summary of the Responses to the Questionnaire for Survey on Copyright Registration and Deposit Systems, [https://www.wipo.int/export/sites/www/copyright/en/registration/pdf/registration\\_summary\\_responses.pdf](https://www.wipo.int/export/sites/www/copyright/en/registration/pdf/registration_summary_responses.pdf). The other nations are Algeria, Argentina, Austria, Bahrain, Belarus, Brazil, Chile, China, Colombia, Costa Rica, Ecuador, Germany, Ghana, Guatemala, Guinea, Hungary, Indonesia, Italy, Jamaica, Japan, Korea, Kyrgyz, Madagascar, Mali, Mauritius, Moldova, Mongolia, Nepal, Oman, Pakistan, Peru, Romania, Russia, Serbia, Slovenia, South Africa, Spain, Thailand, Tunisia, and The Ukraine. Presumably seven did not report how many they had registered for these years.

more within four days. In China, among the most important nations for copyright protection today, there is an optional copyright registration procedure which takes two-three months, but “[n]o substantive examination is undertaken.”<sup>363</sup> There are a few nations which retain a procedure for substantive copyright examination, for instance India, but they are a distinct minority, and it is not a prerequisite to bringing a copyright suit.<sup>364</sup> Only five other nations reported to WIPO in 2010 that a copyright registration is a prerequisite to initiation of a copyright infringement action, as it is in the United States for domestic works.<sup>365</sup>

Going forward, it is worth bearing in mind what an outlier the United States is. One might think the Fourth Estate decision would spur copyright owners to demand abolition of the registration requirement, or of registration generally, but instead the Copyright Alliance urged the creation of “modern and nimble registration services” for copyright owners.<sup>366</sup> One may infer that copyright registration —with time-consuming substantive examination — is providing a service valued by many different participants in copyright-intensive industries.<sup>367</sup>

The Compendium suggests a number of reasons why copyright registration would offer benefits to rightsholders, including making available

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<sup>363</sup> Intellectual Property Office, Copyright Recordal in China, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/917329/Copyright\\_Recordal\\_-\\_IP\\_in\\_China\\_Factsheet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/917329/Copyright_Recordal_-_IP_in_China_Factsheet.pdf).

<sup>364</sup> COPYRIGHT OFFICE GOVERNMENT OF INDIA, PRACTICE AND PROCEDURE MANUAL 2018 (2018), [https://copyright.gov.in/Documents/Manuals/LITERARY\\_MANUAL.pdf](https://copyright.gov.in/Documents/Manuals/LITERARY_MANUAL.pdf) However, when asked via Twitter, several Indian attorneys asserted that copyright examination in India is just a check of the forms. Swaroop Mami (@tnagartornado), Twitter (May 20, 2021, 11:19 PM), <https://twitter.com/TnagarTornado/status/1395595192707665921> (“India’s examination system is practically a technocratic compliance exercise. A tick-box kind of compliance on whether the relevant documents are there and whether the forms have been filled correctly. There’s no real adjudication on copyrightability or anything else. . . Theoretically, they have powers to decide on copyrightability. But practically, they don’t use them.”)

<sup>365</sup> WIPO Summary of Responses, *supra* note 356, at 25-26. These were Mali, Mauritius, Mongolia, and Syria for all works, while Nepal is similar to the United States in requiring it for domestic works. These nations registered a total of 4,054 copyrights during 2005-2009 (aside from Syria, which did not report its numbers).

<sup>366</sup> Terry Hart, *SCOTUS Resolves Court Split in Fourth Estate, but Registration Concerns Remain*, COPYRIGHT ALLIANCE (Mar. 4, 2019), <https://copyrightalliance.org/scotus-resolves-fourth-estate-registration-concerns-remain>.

<sup>367</sup> Of course, it is possible that copyright owners would prefer abolition of copyright registration and are simply resigned to the current system. However, there has not been much visible effort in that direction, either in terms of lobbying or public advocacy. The ongoing deferred examination study, discussed *supra* in the introduction, further suggests a desire to work within a registration regime rather than abolish it.

statutory damages and meeting the deposit requirements in the Library of Congress.<sup>368</sup> However, the fact that registration creates a public record of ownership that is prima facie evidence of validity is the first (and fourth) reason listed, and a substantive examination process strengthens that claim dramatically. The registration was not just entered mechanically, it was examined by a trained expert and then approved. A 1986 study found that “[t]he value to the copyright community [of copyright registration] far exceeds the cost to the Copyright Office,” and 90% of respondents from copyright industries preferred the U.S. model of examination and registration to a no-examination automatic protection model available in other countries.<sup>369</sup> Given that exports in core U.S. copyright sectors contribute in the billions of dollars each to the U.S. economy,<sup>370</sup> having this official seal of approval given to copyright registrations is a non-trivial benefit which is not lightly given up.

The same quality control measure offered by the Copyright Office may also serve to limit meritless litigation, even though a suit can technically be brought following a denial.<sup>371</sup> Indeed, opponents of “copyright trolling” find copyright registration particularly important for the quality control and procedural safeguards it offers.<sup>372</sup> Thus, it seems that copyright examination offers something both sides of the copyright debates of today like, by giving both value and quality control to registrations. As such, it seems unlikely to be discontinued, nor do I seriously urge that we do so — I do however consider it worthwhile to not lose track of how unusual this practice is as we consider ways to streamline it in the digital age.

### B. How Should We Examine?

Especially following the *Fourth Estate* decision, there is an increased desire to see registrations processed more quickly. One major thing this article demonstrates is that works of visual art are rejected at a far greater rate than performing or textual works. We should consider treating applications for registration in the visual arts differently — or perhaps having a

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<sup>368</sup> COMPENDIUM 3D. *supra* note 39. § 202; 17 U.S.C. § 408.

<sup>369</sup> D.W. KING ET AL., COST-BENEFIT ANALYSIS OF U.S. COPYRIGHT FORMALITIES 117-20, (1987) (NTIS Pub. PB 87-183620).

<sup>370</sup> Table 6: *Estimated Export Revenue for Employer Firms: 2013 through 2019*, in UNITED STATES CENSUS BUREAU, SERVICE ANNUAL SURVEY HISTORICAL DATA (NAICS-basis): 2019, <https://www.census.gov/data/tables/2019/econ/services/sas-naics.html>.

<sup>371</sup> Pottinger & Frye, *supra* note 35, at 10.

<sup>372</sup> Brief amici curiae of Professors of Copyright Law on behalf of Respondent, *Unicolors, Inc v. H&M Hennes & Mauritz, LP*, No. 20-915 (U.S. 2021).

streamlined system of copyright registration for the other classes and focusing examination on works of the visual arts.

In fact, this is hardly a new idea. Eric Schwartz of the Copyright Office suggested exactly that at the “Copyright in the Twenty-First Century” conference mentioned above.

I think the current examination process for many works will become less important in the future. We may see the development of a multi-tiered registration system, with different legal and commercial incentives for various types of registrations. Works may continue to be registered, but will they require the same type of examination that is currently being used? For example, is it necessary for printed works to be examined for copyrightability?<sup>373</sup>

This approach has an obvious appeal. It would allow applications to be processed automatically from low rejection rate classes, while retaining examination for works of the visual arts more likely to fail the examination process. The result would eliminate delays in processing textual and musical works and allow infringement cases involving these works to be brought without delays. The Copyright Office would also be focus on examining works which are more likely problematic, and given the reduced workload and increased fees from quick registrations might even be able to operate funded solely by fees at last.<sup>374</sup>

Of course, even for works being automatically processed, we would want some sort of verification. One simple solution would be to ask additional questions of applicants, confirming that their work does not fit into the categories which lead to rejections typically in textual and performing works. If an applicant is unable to confirm these details it would not be an automatic rejection, but it would rather be routed to an examiner for individual review.<sup>375</sup> This option could be available for certain types of works like books and music, where rejection rates are low, but would not be available for graphic art or computer programs, for instance.

To see how this would play out, we can use music as an example. Currently, as part of the registration process, an applicant is asked the

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<sup>373</sup> Eric Schwartz, *The Role of the Copyright Office in the Age of Information*, 13 *CARDOZO ARTS & ENT. L.J.* 69, 72 (1994). Via e-mail, Eric Schwartz explained that he was stating the views of Barbara Ringer, the acting Register of Copyrights, as well as his own, and that she had foreseen much of the coming change in technology and its relationship to the copyright office.

<sup>374</sup> Robert Brauneis, *Properly Funding the Copyright Office: The Case for Significantly Differentiated Fees*, GWU Law School Public Law Research Paper No. 2017-58 (July 4, 2017).

<sup>375</sup> In a way, the checklist would be doing the work of the copyright technicians used to screen applications for examiners in the past. *Fiscal 2000 Budget Request: Hearing Before the Subcommittee on Legislative Branch, Comm. on Appropriations*, 106th Cong., 1st Sess. (1999) (statement of Marybeth Peters, Register of Copyrights), <https://www.copyright.gov/docs/regstat99.html>.



title, whether the work is published, the year the work was completed, the author(s) and nature of their authorship, and any limitations of the copyright claim.<sup>376</sup> The applicant deposits the best edition of the work, and the application is examined. There are additional regulations for registration of a musical album consisting of multiple musical works, sound recordings, and art/text, although they do not fundamentally change the questions being asked.<sup>377</sup>

I would add three questions, based on the Compendium of Copyright Registrations Chapter 800.<sup>378</sup> Firstly, is the musical composition longer than one minute, or twelve bars?<sup>379</sup> This is to remove concerns of claimants attempting to protect works that are short musical phrases and no more. Clearly works that are less than a minute long can be protected by copyright, but human examination is required to confirm their copyrightability. The second question is somewhat along the lines of questions of authorship already asked on the form, but reduces it to a modal question for purposes of bypassing examination: is the music and any lyrics original to and composed/written by the composer/author? The final question I would require to bypass examination is imported directly from the Compendium at § 802.5(A): does the work consist of content beyond basic musical forms (for instance scales, arpeggios, and common chord progressions)?

If an applicant cannot answer “yes” to all three questions, it would be routed to a human examiner. With the need to review uncontroversial applications removed, examiners would be able to process difficult applications with greater dispatch. On the other hand, if an applicant fraudulently answers “yes” to the above questions in a manner which violates 17 U.S.C. § 411(b), the registration will be invalid and may subject the applicant to fines under 17 U.S.C. § 506(e).<sup>380</sup> It would also be possible to institute randomized deferred examination following automated registration (say one in twenty applications are randomly subject to deferred examination) as a further quality control. An even more registrant-friendly system would provide automated registration for all with deferred examination for PGS works, although this might occasion greater opposition.

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<sup>376</sup> UNITED STATES COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR MUSICAL COMPOSITIONS (2021), <https://www.copyright.gov/circs/circ50.pdf>.

<sup>377</sup> *Group Registration for Works on an Album of Music (GRAM)*, COPYRIGHT.GOV, <https://www.copyright.gov/gram> (last visited Feb. 6, 2023).

<sup>378</sup> COMPENDIUM 3D, *supra* note 8, § 800.

<sup>379</sup> Special thanks to Blake Morgan for suggesting these, noting that twelve bars is “the blues after all.”

<sup>380</sup> This must be intentional fraud, not a mistake, *Unicolors, Inc. v. H&M Hennes S Mauritz, L.L.P.*, 595 U.S. \_ (2022).

Artificial intelligence may also play a role in checking that original expression is in fact being claimed, using plagiarism checking tools which are at this point fairly common.<sup>381</sup> Pamela Samuelson suggested exactly this at the same 1994 conference, where she noted that:

[a]n electronic version of the work could then be sent, along with an electronic form provided by the server. The server would automatically scan the new work and compare it with documents in the system; assuming that no close or exact match was identified, the server could issue an electronic certificate of registration which would then be e-mailed to the registrant. Much the same procedure might be used for recording transfers of copyright interests.”<sup>382</sup>

The Copyright Office would not be best situated to develop these AI solutions, and registrants should be empowered to have their work reviewed by an authorized third-party AI provider and provide a digital certificate that conforms to an API when registering. For works where the applicant has stated on the application what is and is not in the application, and with the Courts forming a further backstop, AI could be more than enough to provide a similar level of confidence in the examination as we currently have.

One final backstop might be to condition the grant of automatic registration on provision of additional metadata for a work, such as ISRC codes for recorded music or an ISBN for a book. This would enable more efficient automated use of the Copyright Office’s database in connection with various industry databases — and confirmation of exactly what the work being claimed is in the marketplace.

## V. CONCLUSION

When copyright registration is discussed, the possibility that a registration may be denied is generally considered remote. And there’s a reason for this — through history the vast majority of applications for copyright have resulted in registrations (the dips in registrations below are a result of delayed processing, not rejections).

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<sup>381</sup> See E.G. Daniel Midson-Short, *What Is the Best Plagiarism Checker? We Bought 12, Here’s The Winner . . .*” CODELESS INTERACTIVE (Sept. 15, 2021), <https://codeless.io/best-plagiarism-checker>.

<sup>382</sup> Samuelson, *supra* note 305, at 57.

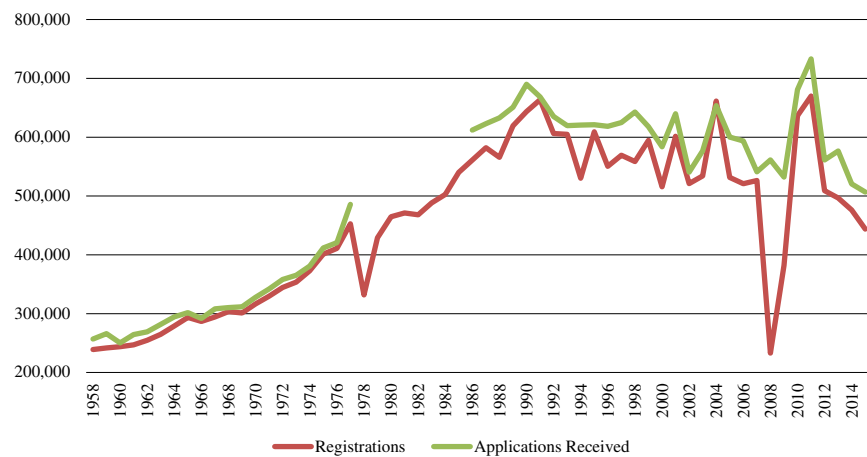


Figure 13 - Relationship of Registrations to Applications, 1958-2015

However, that simple story hides a great deal of complexity, which this piece has endeavored to bring out. Copyright examination has not been uniform over time or by class, and has evolved along with copyright law and the administration of copyright registration. Different types of work are treated very differently by examiners, and this has been true for at least 65 years. Perhaps it is time for copyright registration practice to reflect that.

In addition, this article has sought to illuminate examination process through history, but there are substantial questions of administrative law that have been raised through this narrative. The history of copyright registration is one of delegation by Congress, and the history of examination shows that the registration process went beyond stamping a form. The early history of delegation to the clerks of the Judiciary is especially peculiar, as is the subsequent history of delegation from Congress to the Library of Congress, which is part of the legislative branch.<sup>383</sup> This history is increasingly important given the increased focus lately on delegation and the authority of the Patent Trial and Appeal Board,<sup>384</sup> and there are looming questions as to how it relates to the Copyright Claims Board created by the passage of the CASE Act.<sup>385</sup> There are likewise questions of defer-

<sup>383</sup> This contrasts with patents, where the delegation has always to the executive branch. For an exploration of the early delegations to the Patent Office, which offers a striking contrast, see Christine Kexel Chabot *The Lost History of Delegation at the Founding*. 56 GA. L. REV. 81 (2021).

<sup>384</sup> *United States v. Arthrex Inc.*, 141 S. Ct. 1970 (2021).

<sup>385</sup> U.S. Copyright Office, *Copyright Small Claims and the Copyright Claims Board*, COPYRIGHT.GOV, <https://www.copyright.gov/about/small-claims> (last visited Feb. 6, 2023).

ence to the Copyright Office, where the standard varies depending whether the question being reviewed is “registrability” or “copyrightability.”<sup>386</sup> Although this piece has gone into much of the background of these issues, further exploration of these issues is needed, and I hope to provide it in a forthcoming piece.

Until the twentieth century copyright examination was almost entirely focused on the form of the work and not its content for copyrightability — looking at whether it was a book, a product label, a photograph, or other species of work that was proscribed or permitted for registration. The systematic practice of substantive examination began at the Patent Office in examining product labels, especially following *Higgins v. Keuffel* at the end of the nineteenth century, but became more important with the formation of the Copyright Office and further with improvements in administration under Register Clement Bouve. Under the 1976 Act the vast majority of rejections of applications for registration involved substantive questions of copyrightability.

The vast majority of applications which are contested are also in the graphic arts, and have been for some time. Meanwhile, the time to get a registration is typically several months, and although this is a marked improvement from a few years ago, it’s still a substantial delay. The Copyright Office should consider making certain registration automatic in textual works and performing arts, provided the applicant affirms that the work meets certain criteria. Doing so would empower more efficiency administration of copyright examination in the 21st century.

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<sup>386</sup> William Patry, *Deference to Copyright Office Registration Decisions*, THE PATRY COPYRIGHT BLOG (May 30, 2007), <http://williampatry.blogspot.com/2007/05/deference-to-copyright-office.html>.