AIPLA
American Intellectual Property Law Association

March 19, 2020

Maria Strong
Acting Register of Copyrights and Director of Policy and International Affairs
U.S. Copyright Office
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: Comments Submitted Pursuant to Notification of Inquiry Regarding Online Publication, 84 Fed. Reg. 66328 (Dec. 4, 2019)

Dear Acting Register Strong:

The American Intellectual Property Law Association (AIPLA) is pleased to offer comments in response to the above-referenced U.S. Copyright Office Notification of Inquiry on issues related to Online Publication.

Founded in 1897, AIPLA is a national bar association of approximately 12,000 members who are engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent (utility and design), trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping to establish and maintain fair and effective laws and policies that stimulate and reward invention but that also balance the public's interest in healthy competition, reasonable costs, and basic fairness. Our members have a key interest in an efficient and effective Copyright Office.

AIPLA offers the following responses and comments to the questions and issues presented in the notice.

1. Section 409(8) of the Copyright Act requires applicants to indicate the date and nation of first publication if the work has been published. What type of regulatory guidance can the Copyright Office propose that would assist applicants in determining whether their works have been published and, if so, the date and nation of first publication for the purpose of completing copyright applications? In your response, consider how the statutory definition of publication applies in the context of digital on-demand transmissions, streaming services, and downloads of copyrighted content, as well as more broadly in the digital and online environment.

To the extent that the Copyright Office can provide additional guidance to applicants regarding publication, AIPLA would support this effort. Even experienced copyright practitioners often find it difficult to definitively ascertain whether, when and where a work has been published. However, AIPLA is mindful that certain vagaries regarding

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publication likely result not from insufficient guidance, but rather from the statute itself and how it has kept pace, or not, with technological developments. If such issues are to be addressed, it must be by Congress. (See Question 8).

2. Specifically, should the Copyright Office propose a regulatory amendment or provide further detailed guidance that would apply the statutory definition of publication to the online context for the purpose of guiding copyright applicants on issues such as:

i. How a copyright owner demonstrates authorization for others to distribute or reproduce a work that is posted online;

ii. The timing of publication when copies are distributed and/or displayed electronically;

iii. Whether distributing works to a client under various conditions, including that redistribution is not authorized until a ''final'' version is approved, constitutes publication and the timing of such publication;

iv. Whether advertising works online or on social media constitutes publication; and/or

v. Any other issues raised in section I(C) above.

No. In AIPLA's view, issues and confusion regarding "online" publication arise from the statute itself. If such issues are to be resolved, we believe that this is best done by Congress.

3. Can and should the Copyright Office promulgate a regulation to allow copyright applicants to satisfy the registration requirements of section 409 by indicating that a work has been published ''online'' and/or identifying the nation from which the work was posted online as the nation of first publication, without prejudice to any party subsequently making more specific claims or arguments regarding the publication status or nation(s) in which a work was first published, including before a court of competent jurisdiction?

No. This proposed approach might result in applicants failing to give an important issue due consideration. Moreover, it is not clear how the lack of prejudice would play out in litigation where publication dates may determine whether a plaintiff is entitled to seek statutory damages or attorneys' fees.

4. Applicants cannot currently register published works and unpublished works in the same application. Should the Copyright Office alter its practices to allow applicants who pay a fee to amend or supplement applications to partition the application into published and unpublished sections if a work (or group of works) the applicant mistakenly represented was either entirely published or unpublished in an initial application is subsequently determined to contain both published and unpublished components? What practical or administrative considerations should the Office take into account in considering this option

AIPLA is mindful that many errors in applications may be corrected through amendment without a new application, and recognizes that other kinds of errors may not, such as those identified in this question. AIPLA is therefore concerned that creating a remedy to correct these types of errors in this manner, when the same is not generally available for other kinds of errors that would require a new application, would provide preference for these mistakes over those that may require a new application. With that caveat, AIPLA believes that certain changes to Copyright Office policies and regulations pertaining to group registration options would go a long way in reducing the considerable harm that genuine confusion regarding publication status can cause for rights holders. *See, e.g., Gold Value International Textile, Inc. v. Sanctuary Clothing LLC*, 925 F.3d 1140 (9th Cir. 2019) (affirming decision invalidating plaintiff's registration and granting summary judgment and attorneys' fees to defendant in part because the "Register has indicated that it would not register a single group of published and unpublished works.") AIPLA believes that the next generation registration system could and should be designed to avoid any such traps.

In this regard, AIPLA believes that the Office should articulate clear standards that enable both applicants and Examiners to determine whether and when such amendments would be appropriate and allowed.

5. For certain group registration options, should the Copyright Office amend its regulations to allow applicants in its next generation registration system to register unpublished and published works in a single registration, with published works marked as published and the date and nation of first publication noted? What would the benefits of such a registration option be, given that applicants will continue to be required to determine whether each work has been published prior to submitting an application? What practical or administrative considerations should the Office take into account in considering this option?

With regard to registration options, AIPLA urges the Copyright Office to consider a different structure entirely. AIPLA strongly believes that development of the next generation registration system should not be constrained by historical forms, methods of operation and fee structures, and that the Office should consider changes to the current price-driven model at the same time. Such changes to both the registration system and fee-structure would require amendments to the regulations.

We believe that a new registration system should enable users to register various works in a single session regardless of whether these might historically be considered as part of a group, whether unpublished and published, at the time of registration. We envision a system where the user identifies the works intended for registration, inputs various data about such works (including claims of publication), uploads deposit copies, and the system (wizard) should charge fees according to the types of works and volume, without regard to whether these are published, unpublished or unified in a "single registration." Using this type of system, the user should not be concerned with deciding whether to register works collectively, in a single registration, or individually, whether published or unpublished. As an example, the user could compile a number of separate works (such as photographs) into an application for registration of a claim to copyright in the works considered as a whole (such as a collection of images, including the choice of

arrangement). Otherwise, the user in the example above should seek to register copyright in each image and the Office should charge appropriate fees to administer those applications, whether each work is published or unpublished.

Illustrative benefits of a system with the capabilities suggested above is that, to the extent the information pertaining to each work is the same (i.e., author, claimant, date of creation, place of creation, etc.), it would streamline the application process and provide the Office with consistent information across works, to populate a reliable registry and database. It would also perhaps mitigate against fatal publication claim errors if the same application were used for both published and unpublished works. Moreover, if the revised fee-structure is based on volume of works such that it is no longer more economical to register claims to copyright in unpublished works (by grouping them together), this might also discourage applicants from claiming that published works are unpublished simply to keep application costs down.

As a practical matter, AIPLA believes a next generation registration system should enable users to seek registration of all types of works, including both published and unpublished, in one session. The system should include a sophisticated wizard to streamline and homogenize data entry. A revised fee structure should incent creators to use the system early and often. This should result in a greater volume of works being handled by the Office, and in mostly digital format. The Copyright Office must account for this increased volume of applications and works in staffing and infrastructure.

AIPLA believes that the user-facing next generation registration system must be developed in conjunction and integrated with the backend IT infrastructure improvements that are currently being implemented at the Copyright Office. *See, e.g.*, https://www.copyright.gov/reports/itplan/modified-modernization-plan.pdf. The surge of digital material will need to be managed by the Copyright Office and coordinated with the LOC. The Copyright Office must also capitalize on the opportunity to create a publicly available database that is user friendly and searchable across data fields, with access to the deposit material as much as possible, in combination with this effort – a publicly accessible version of the backend data and deposit material that the Copyright Office is then managing. AIPLA believes that such a collaboration of efforts was not undertaken when eCO was being developed and updated over the years, such that the public only has had access to a rudimentary database of limited information (https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First), without access to works online in conjunction with those records. Another project we believe was undertaken to provide the public with greater access to Copyright Office records is the Virtual Card Catalog (https://vcc.copyright.gov/browse). We note the VCC is still in "Proof of Concept." However, AIPLA notes that VCC is very cumbersome and difficult to use. As one analyst at the LOC stated in the blog announcing availability of the VCC: "This Virtual Card Catalog (VCC) is the first step of many. It consists of cards arranged just like you'd find them in one of those old card catalogs you used to see in libraries everywhere. The VCC is bare-bones and doesn't have all the features of a modern search engine." https://blogs.loc.gov/copyright/2018/01/virtual-card-catalog-available-online/.

In summary, AIPLA encourages the Copyright Office not to be constrained by current methods of operation, fee-structures, existing infrastructure, or other perceived obstacles, but instead to learn from past experiences and capitalize on collaborative efforts across modernization efforts that result in a Copyright Office that is truly "next generation" including, very importantly, the online registration system. We believe the Office should be guided by these principles when considering how it registers works of all types in the future, including whether to include unpublished and published works in a single registration.

7. Is there a need to amend section 409 so that applicants for copyright registrations are no longer required to identify whether a work has been published and/or the date and nation of first publication, or to provide the Register of Copyrights with regulatory authority to alter section 409(8)'s requirement for certain classes of works?

No. As noted in response to Question 3, it is extremely important that information about the publication status of a work remain a matter of easily verifiable public record. For prospective litigants, this data can be critical. Because eligibility for statutory damages and fee shifting can be contingent upon registration occurring within three months of publication, these dates often have significant impact on whether, when and how disputes settle. Were this information not a matter of public record, accused infringers would be forced to make critical decisions about how to respond to a complaint without a meaningful sense of their potential exposure. Similarly, a registrant who filed within five years of publication will be afforded benefits in litigation that may bear on how a dispute plays out.

As stated in response to Question 5, AIPLA believes that the consequences for making an error in good faith as to publication status, date and nation should be less dire. We believe that this can likely be accomplished on the Copyright Office side, without any amendments to the Act, it being understood that clarifying the basis for such confusion in practice would likely require congressional action to address the meaning of "publication" and "copies" among many other related issues.

Additionally, for works made for hire, anonymous works and pseudonymous works, duration of copyright will hinge on the date of publication.

In short, this information will be necessary in many instances and should be included in applications for registration so that it is a matter of public record.

8. Is there a need for Congress to take additional steps with respect to clarifying the definition of publication in the digital environment? Why or why not? For example, should Congress consider amending the Copyright Act so that a different event, rather than publication, triggers some or all of the consequences that currently flow from a work's publication? If so, how and through what provisions?

As noted above, AIPLA submits that the Copyright Office should amend its policies and guidance with regard to publication issues in order to address some of the more frequently encountered *consequences* of the ambiguities of the definition. However, this would not resolve more fundamental issues surrounding publication; for this,

Congress would need to amend the statute. This may be worthwhile. If Congress does alter the definition, however, we strongly urge that it proceed very cautiously to ensure that any clarification of the definition does in fact clarify the definition and does not inadvertently introduce new ambiguities and issues. Numerous provisions throughout the Copyright Act apply differently depending upon the publication status of a work, so even the simplest of changes to the definition of publication may have far-reaching and significant unintended consequences.

The definition of publication in section 101 of the Copyright Act is not entirely clear, especially in the case of works first made available to the public online. On its face, it appears to be somewhat arbitrary, drawing legal distinctions between displays and performances and other forms of content dissemination that seem illogical. A video posted on YouTube that reaches millions of people is not considered published, while a photograph in a High School yearbook that reaches a few hundred people is. This situation dates back to the Copyright Act of 1976 where it is stated in the House Report No. 94-1496, page 138, with respect to broadcasts: "any form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work."

One possibility in terms of amendment would be to replace the definition with a practical test: "publication" only occurs if a distribution or offer to distribute copies of works is made "by or under the authority of the copyright owner." The Copyright Office has already concluded that the distribution must have been accomplished under the authority of the copyright owner; this type of amendment would make this the crux of the issue. Of course, the meaning of "copies" would remain in question in this context.

Alternatively, Congress might consider that the ambiguities of publication stem from the fact that the term is defined in relation to "copies" and "phonograms", i.e., fixation in material objects. Due to technological advances, however, works subject to copyright may be expressed in digital form and structured as "digital objects" (aka "digital entities") or similar data structures that may be deemed the logical equivalent of fixation in a material object. The article: "Blocks as digital entities: A standards perspective" provides background information that may be helpful to better understand progress that has been made over many years. Arguably, the reason that publication is not intuitive in the digital age is because the law was written in the analog age and has yet to be amended to embrace the digital age and the relevant concepts.[1]

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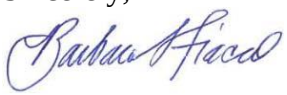
[1] This dialogue started at the Copyright Office with early experimental projects dating back to the 1990s, with funding from the Defense Advanced Research Projects Agency and the Library of Congress (see, e.g., J. Nierman, Major Milestone, LOC (1996) at https://www.loc.gov/loc/lcib/9604/cords.html). Certain copyright-dependent industries such as the publishing industry have made great strides since then in developing registry/recordation systems for the management of works fixed in digital form and structured as digital objects (*see, e.g., International DOI Foundation* at https://doi.org). Progress has also been made with respect to movie and television assets (*see, e.g., Entertainment Identifier Registry Association* at https://eidr.org). Safeguards such as the proposal that the Copyright Office retain a hash of a digital object embodying a work subject to copyright for verification purposes in the event of litigation at a later time may be an important aspect of any such registration/recordation system.

AIPLA has considered the question of whether it makes sense to replace "publication" with some other "trigger." We believe that this approach would likely create more new issues than it would resolve. We considered other potential triggers, such as "date of creation," but they all seemed equally unclear. AIPLA therefore does not believe the concept of "publication" should be replaced; instead, it should be revised to embrace the digital age.

Thank you in advance for considering these views. We stand ready to discuss any questions you may have.

Sincerely,



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