



PROFESSIONAL PHOTOGRAPHERS OF AMERICA

DETERMINING PUBLICATION IN COPYRIGHT REGISTRATION: A DILEMMA FOR AMERICAN CREATORS¹

American creators have long sought protections under America's copyright system - particularly those creating higher-volume, relatively lower economic value works such as photographs and other visual works. Unfortunately, for the largest classes of creators, those protections have been elusive, if not altogether unattainable. On paper, copyright protection is available to all. However, in practical terms that is far from the truth. Among the hurdles:

- The lack of a small claims remedy for relatively low value infringements;
- Changing rate structures that place the higher percentage of the burden on those who can least afford it;
- An outdated deposit system; and
- A murky requirement to determine whether a work has been published prior to registration

In recent years, the United States Copyright Office has engaged in efforts to reverse these troubling issues. We applaud the Copyright Office, particularly Register Karyn Temple, for pledging to create a system that works fairly for all creators.

The CASE Act, legislation to provide a small claims remedy is making its way through Congress, and PPA strongly supports it. Proposals for troublingly high increases in fees appear to have been pulled back. At the same time there is consensus that the Copyright Office's business processes require modernization. While much of that attention is addressed to improved technological function, the modernization process is also an opportunity to revise antiquated and/or ill-

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advised aspects of the statute that hinder the maximization of efficiency in the American copyright system. This White Paper will discuss in detail one of the most important areas of needed statutory change: the requirement to indicate the publication status of a work as part of an application for copyright registration.

In Part I, this White Paper will discuss how the requirement to indicate publication status as part of a registration application is no longer necessary for American authors. In Part II, it will analyze the lack of clarity in the law and how that combines with the difficulty of knowing all the relevant facts. In Part III, it will offer possible solutions to this problem. This White Paper will conclude that the requirement to indicate publication status of a work as part of the registration process is unnecessary in modern times, creates a substantial burden that interferes with creators' ability to enforce their rights fully, and that a change to that requirement is a critical aspect of Copyright Office modernization.

Part I – The Significance of Publication

History

From 1790 through 1977, first publication of a work was the signal act that extinguished state law (also known as common law) copyright and triggered the federal Copyright Act.² Publication represented the author's choice to distribute their work to the public: to forsake the privacy and absolute control over their work, as well as potentially perpetual copyright protection in exchange for the opportunity to exploit the work for economic gain. Under the old laws, this exchange included the conditional requirements of the federal act to comply with a variety of formalities. Failure to comply imposed the draconian penalty of the loss of all copyright rights. That led to legal contortions by some courts to avoid such harsh

² *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

results. These were well intentioned but also served to confuse the legal standard of publication further, as will be discussed below.

The 1976 Act altered the bargain. State copyright protection was pre-empted and all works created since the 1976 Act took effect on January 1, 1978 are protected at the federal level from the moment of their creation by operation of law.³ Overnight, the copyright significance of publication diminished immeasurably. The creator's choice to keep their work physically hidden is now of limited legal significance and matters more as a practical barrier to copying and other use.

At the same time, the formality requirements on which federal copyright rights had been a precondition were substantially reduced.⁴ Arguably, this maintained a balance: creators largely lost the availability of legal protection of state law but in exchange were freed from federal formalities. But there was a catch. Insofar as the enforcement of those rights, copyright registration of U.S. works was retained as a prerequisite to civil enforcement in federal court, and also as a general prerequisite to the availability of statutory damages and attorney's fees. This was done not for the benefit of creators, but to create a punitive incentive for the continued use of the registration system.⁵

Perhaps because of its long pedigree, the copyright registration system seems to have taken on a sacrosanct status. But history does not bear this out.

Since 1870, the registration system has been intertwined with if not dominated by the ambition of the Library of Congress to build its collection. Thus, even though the "incentives" to register are punitive loss of enforcement rights by creators and

³ 17 U.S.C. §102(a).

⁴ The formality of copyright notice lingered another decade until the Berne Convention Implementation Act of 1988.

⁵ Wedgeworth and Ringer, "*The Library of Congress Advisory Committee on Copyright Registration and Deposit (ACCORD): Report of the Co-Chairs*," at 23-24 (Sept. 1993)(available at <https://www.copyright.gov/1201/accord/accord.pdf>).

copyright owners, it has been asserted over and over through the years that registration benefits copyright owners as a database of available works.⁶ The broad swaths of professional creators who do not register their works belie that assertion. Indeed, that so many creators do not participate undercuts the asserted value of the registration database, as it is incomplete.

The history of the registration system is a seemingly forgotten reality that leading copyright minds have been trying change fundamentally its role in the American copyright system for over a century. The first Register of Copyrights, Thorvald Solberg, advocated for the removal of formalities including mandatory registration as early as 1903:

[A] system has gradually grown up under which valuable literary rights have come to depend upon exact compliance with these statutory formalities which have no relation to the equitable rights involved, and the question may be very well raised whether this condition should be continued....⁷

Solberg did not fully achieve that goal in the 1909 revision, although he is credited with a “softening” of formalities in that Act.⁸ Solberg continued to work to remove mandatory formalities, including registration, and eventually he wrote the text of H.R. 11258 of the 68th Congress. That bill would have made registration entirely optional so as to allow the United States to join the Berne Convention (then referred to as the International Copyright Union). On January 22, 1925, Register Solberg testified to Congress in support of the bill:

Copyright legislation is primarily enacted for the protection of the authors of such works as come within

⁶ See Kaplan, Benjamin, “*Copyright Law Revision*,” Committee on the Judiciary, United States Senate, Study 17 at 42-43, 86th Cong. 2d Sess. (1960); ACCORD at 6-7; Registration Modernization Notice of Inquiry, 83 Fed. Reg. 52336 (Wednesday, Oct. 17, 2018).

⁷ Kaplan at 15 quoting “*Report on Copyright Legislation by the Register of Copyrights* (1904) at p. 25.

⁸ *Id.* at 16.

the scope of the copyright laws, and inasmuch as the first and fundamental endeavor has been to secure complete and adequate protection for the creators of literary, musical, dramatic, and artistic works, this bill may properly be designation an authors' bill. It distinctly affirms that copyright is secured for all the writings of authors from the time of the making of their works and that copyright shall vest in the author of the work immediately upon its making and shall not depend upon the accomplishment of any conditions or formalities whatever.⁹

Although that bill was not enacted, similar legislation was reintroduced in subsequent Congresses. H.R. 12549 of the 71st Congress was passed by the House of Representatives and was being considered in the full Senate when a filibuster on a different matter interrupted the process and the Senate adjourned before taking a final vote.¹⁰ In the 74th Congress, S. 3047 was passed by the Senate but bogged down over issues of industrial design protection and copyright in recorded music during twenty-seven days of hearings in the House.¹¹

Notwithstanding these efforts, the Copyright Act continues to this day to require registration as a pre-requisite for the enforcement of rights in U.S. works. It is not the purpose of this White Paper to advocate for the abolition of the registration system, or even transformation of registration to an optional choice, as Solberg advocated. However, the nearly forgotten history of efforts towards that goal should be a reminder that the registration system has never been static or irrevocable. On the contrary, the particulars of the registration system have been altered many times over the years with the aim of improving its functioning.

⁹ Committee on Patents, "*Hearing on H.R. 11258 A Bill to Amend and Consolidate the Acts Respecting Copyright and to Permit the United States to Enter the International Copyright Union*," at 17, 68th Cong. (Jan. 22, 1925).

¹⁰ Goldman, Abe, "*The History of U.S.A. Copyright Law Revision from 1901 to 1954*," Committee on the Judiciary, United States Senate, Study 1 at 6-7, 86th Cong. 2d Sess. (1960).

¹¹ *Id.* at 9.

So it is that we return to the primary concern of this White Paper: that applicants for registration must indicate whether or not their work is published.¹² It ought not be controversial that the registration requirements and process should be as minimally invasive and burdensome as possible. And given the complications of reaching the conclusion of whether a work has been published (discussed below), and that even an accidental error can cost the registrant the ability to enforce their rights, the obligation to indicate that status should be reviewed and minimized. To that end, this section considers what relevance publication retains in the American copyright system and whether it is necessary for the Copyright Office to have that information in order to register the work?

Copyright Notice

The formality of copyright notice endured a decade longer than other formalities in U.S. law, until the Berne Convention Implementation Act of 1988.¹³ Works published between January 1, 1978 and March 1, 1989 were still required to display a copyright notice upon publication or lose all federal copyright rights. And the year of first publication of the work is integral to proper notice.¹⁴ However, for works created since then, notice upon publication is relevant only for obscure purposes, such as defeating the innocent infringer reduction of statutory damages.¹⁵ Because at least since March 1, 1989 notice is no longer required in order to sustain rights, the Copyright Office does not need to know whether a work created since then has been published at the time of registration for this purpose.

¹² 17 U.S.C. §409(8).

¹³ Pub. L. No. 100-568, 102 Stat. 2853, 2857-59.

¹⁴ 17 U.S.C. §401(b)(2); §402(b)(2).

¹⁵ 17 U.S.C. §401(d).

Deposits

Section 407 requires the deposit of two copies of published works for the use of the Library of Congress.¹⁶ While this necessarily involves a determination of whether a work has been published, it is independent of the copyright registration process. Section 407 “demand copies” are an independent burden placed on copyright owners for the benefit of the public.¹⁷ Thus, nothing in Section 407 indicates a need for the Copyright Office to know at the time of registration whether the work has been published.¹⁸

Section 408 governs deposit copies that are required for copyright registration. There is a distinction made in that only one copy of unpublished works is required, while two deposit copies are required for published works.¹⁹ Clearly, this is a procedural distinction and is not relevant to the Office’s determination of copyrightability of the work. Indeed, the Register is authorized to provide by regulation that only one deposit copy (or even merely “identifying material) be required where the statute would otherwise require two copies, and for the registration of a group of related works.²⁰ Under this authority, the Copyright Office has long permitted the group registration of photographs.²¹

Section 704 provides for retention of deposits by the Copyright Office and Library of Congress. The Library may take all copies of published works while the treatment of unpublished works is more restrained.²² Further, the Register and the Librarian

¹⁶ 17 U.S.C. §407(a) and (b).

¹⁷ Whether such obligation is consistent with Constitutional protections such as the Takings Clause are beyond the scope of this paper.

¹⁸ It is noted that §407(c) authorizes the Register to “exempt any categories of material from the deposit requirements of this section....” This White Paper does not address the deposit requirement, but it is offered that consideration of exempting photographs from the deposit requirement would be welcome and appropriate.

¹⁹ 17 U.S.C. §408(b).

²⁰ 17 U.S.C. §408(c)(1).

²¹ 37 C.F.R. §202.4(h) and (i).

²² 17 U.S.C. §704(b).

may choose to remove copies of published works from the Copyright Office's storage facilities if retention is no longer practicable and desirable. But unpublished works must be retained for the entire term of copyright.²³ In light of the flexibility given to the Register by the statute and the far-off consideration of retention, whether a work has been published is not information needed by the Copyright Office at the time of registration under these provisions.²⁴

Presumptions and Remedies

Section 410 provides that a registration certificate is prima facie evidence of the facts stated therein if registration was made within five years of first publication.²⁵ Similarly, Section 412 conditions the availability of awards of statutory damages and attorney's fees in civil litigation on timely registration, which may be satisfied by registration within three months of first publication of the work.²⁶ While all of these elements are critical to creators and copyright owners, they only apply if and when an infringement suit is brought. The Copyright Office does not need to know whether registration is timely for these purposes in order to make a determination of whether to register the work.

National Origin of Works

The application of copyright protection in the United States to works of foreign authors can depend on where and when the work was first published. Section 104 provides protection to works of foreign authors. An unpublished work is protected "without regard to the nationality or domicile of the author."²⁷ In contrast, a

²³ 17 U.S.C. §704(d).

²⁴ Section 408(f) provides for "preregistration" of works that, by definition, have not yet been published. This paper confines its analysis to the full registration process envisioned in Section 408(a).

²⁵ 17 U.S.C. §410(c).

²⁶ 17 U.S.C. §412.

²⁷ 17 U.S.C. §104(a).

published work is protected if it meets at least one of the statutory criteria. One of the most commonly met of such criteria is that on the date of first publication the author is a national or domiciliary of the United States or a country that shares copyright treaty membership with the United States.²⁸ Another is that the work is first published in the United States or a country that shares copyright treaty membership with the United States.²⁹

In practical terms, nearly all foreign authors will fall into one of the statutory categories. The foundational copyright treaty is the Berne Convention, to which 177 of the 193 United Nations member countries³⁰ have acceded, including the United States.³¹ Further, foreign authors are not obligated to register their works under U.S. law, so those that do will likely have a high incidence of publishing their works here. Nonetheless, there will inevitably be an author from one of the few countries not members of the Berne Convention and whose work was not first published in the U.S. It is acknowledged the Copyright Office needs to know if, when, and where the work of a foreign author was published in order to determine whether to register the work.³²

In the 1976 Act, Congress made a clear distinction between U.S. works, which must be registered in order to bring a civil suit in federal court, and works of foreign authors that are not burdened by such a requirement. Consistent with that distinction, it would be reasonable to retain the requirement to provide information about publication status on registration applications of foreign authors only. There is no need to require it of American authors whose works will always qualify for

²⁸ 17 U.S.C. §104(b)(1).

²⁹ 17 U.S.C. §104(b)(2).

³⁰ See <https://www.un.org/en/member-states/index.html>.

³¹ See https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15

³² The restoration provisions of Section 104A also contain references to issues of publication. However, the protection and enforcement system for restored works involves notices of intent to enforce. Because this is outside the registration system, it is not relevant for the analysis of this paper.

protection here. This is also consistent with the obligation to minimize the burden of the registration requirement for American authors.

Exceptions and Limitations

Publication is also relevant to a variety of statutory exceptions and limitations to copyright rights. Fair use,³³ exceptions for certain uses by libraries and archives,³⁴ performances for the blind or handicapped,³⁵ and the statutory license for noncommercial broadcasting³⁶ all make some type of distinction based on the publication status of the work. None of those, however, need to be determined by the Copyright Office at the time of registration, as they do not affect the copyrightability of a work.

Duration of Copyright and Termination

The date of publication can be relevant to the calculation of the duration of the copyright rights. Most notably, anonymous and pseudonymous works, and works made for hire have a term of protection of 95 years from publication or 120 years from creation, whichever is shorter.³⁷ The duration of copyright protection is of course an important matter. But the question of when a copyright expires is not relevant to whether the work is copyrightable and thus should be registered.³⁸

The publication date of a work may also be relevant for determining at what time a grant of copyright rights may be terminated, if the grant included the right of first

³³ 17 U.S.C. §107.

³⁴ 17 U.S.C. §108(b); §108(h)(1).

³⁵ 17 U.S.C. §110(9); §121(a); §121(b).

³⁶ 17 U.S.C. §118(b); §118(c); §118(e).

³⁷ 17 U.S.C. §302(c); *see also* §302(e); §303(a).

³⁸ This paper has already noted that the publication status is relevant in the context of a registration application for a work created prior to March 1, 1989. A work created after that date would be well within its term of protection. Beginning in the year 2085, it would be reasonable for the Copyright Office to inquire into the publication date of an anonymous, pseudonymous, or work made for hire in the context of a registration application for a work created in 1989.

publication of the work.³⁹ Once again, this information is not necessary for the Copyright Office to determine whether the work should be registered.

Miscellaneous

There are a handful of other references to publication status throughout Title 17, none of which relate to information needed in order for the Copyright Office to register a work. These include criminal penalties for fraudulent copyright notice,⁴⁰ provisions relating to mask works,⁴¹ vessel hull design protection,⁴² and entitlement to payments from the digital audio recording royalty.⁴³

Conclusion

The foregoing discussion shows that there is no need for the Copyright Office to know whether a U.S. work created after March 1, 1989 has been published in order to determine whether to register that work. That is not to say that information is not relevant or would not be useful information for a variety of circumstances. To be sure, if the publication status of the work were known and certain, it would be an easy thing for an applicant for registration to provide. But as is shown below, the reality is that the publication status is not a clear standard. Further, for many creators the relevant facts may be difficult or impossible to know.

³⁹ 17 U.S.C. §203(a)(3).

⁴⁰ 17 U.S.C. §506(c).

⁴¹ 17 U.S.C. §901(a)(5).

⁴² 17 U.S.C. §1302(5).

⁴³ 17 U.S.C. §1006(a).

Part II – The Uncertainty of Publication

Lack of Clarity in the Law

The meaning of “publication” in the Copyright Act has become a legal morass. Congress recognized over forty years ago:

“Publication,” perhaps the most important single concept under the present [1909] law, also represents its most serious defect. Although at one time, when works were disseminated almost exclusively through printed copies, “publication” could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given “publication” a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair.⁴⁴

In an attempt to rectify the problems it observed, Congress codified in the 1976 Act a detailed definition of “publication”:

[t]he distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.⁴⁵

While this definition provides clear answers to some matters that were disputed under the 1909 Act, it raises questions of its own. Further, the definition has been

⁴⁴ House Rept. 94-1476 at 129-130 (September 3, 1976).

⁴⁵ 17 U.S.C. §101.

held to codify and thus import case law from the 1909 Act,⁴⁶ which carries forward many of the vagaries that plagued the old law.

One critical question is what constitutes “a group of persons” for purposes of this definition? The Nimmer treatise notes that this term “has rarely been the subject of judicial examination” and cites only a single case, involving distribution to teachers and students in a school.⁴⁷ So, for example, when a professional photographer provides copyrighted images to a client and authorizes copies to be distributed but only to the extended family, have those images been published under the statutory definition?

That question also implicates the doctrine of limited publication; a judicially created concept that did not constitute a publication that triggered the federal statute under the old law. While not explicitly in the current statutory text, there is a long history in the underlying case law that this doctrine has continued relevance.⁴⁸ The doctrine of limited publication has long been understood as a judicial attempt to mitigate the absolute loss of rights that could occur under the old formalities. Historically, distribution to a defined group for a limited purpose has been held to be limited publication, while distribution destined for the general public is a general publication.⁴⁹

Perhaps the best-known case of limited publication involved Reverend Martin Luther King Junior’s “I Have a Dream” speech, which was distributed in paper copy to the media contemporaneous with the speech, without copyright notice. There, the court held the distribution was only for the limited purpose of news reporting and thus not a general publication.⁵⁰

⁴⁶ See 1 Nimmer on Copyright §4.03[B].

⁴⁷ *Id.*

⁴⁸ 1 Nimmer on Copyright §4.13[B].

⁴⁹ 1 Nimmer on Copyright §4.13[A].

⁵⁰ *Estate of Martin Luther King, Jr. Inc. v. CBS*, 194 F.3d 1211 (11th Cir. 1999).

Into which category does the not-so-hypothetical photograph considered above fall? The distribution was limited to the client's extended family. Is that close enough to the general public that it fails the limited publication test? Does it depend on how big a family the client has? Does the permission to reproduce the work within that group cross the line or is it more like the *King* case?

Perhaps most poignantly, how can it be that such a basic set of facts – a photographer delivering photos to a client – can tie the law in knots? And why should the photographer's rights be held hostage to disentangling the web of uncertainty that continues to elude the Copyright Office and Congress? In the face of such uncertainty, the requirement to designate publication status in the registration becomes a legal trap that can oblige infringers as much or more than it serves creators.

Unknowable Facts

Even if the legal standard for publication were clearer, many creators simply do not have access to the fact of what uses are made of their works after they have been delivered.

Consider again the photographer who has delivered photos to their client. Has the client uploaded some of those to a website? Can they be downloaded or are they merely displayed? Are they generally available to the public, to the client's friends and extended family, or only to the client's immediate family? Was the client's action infringing?⁵¹ Which of the photos were uploaded? When were they uploaded? Where they all uploaded at the same time?

Again, just this one set of commonplace facts triggers a cascade of questions that will affect the correct answer to the question, is the work published? It is common

⁵¹ Although it is widely believed that unauthorized publication does not constitute publication of the work, the statutory definition does not include that element.

for a professional photographer to create 45,000 images a year. No reasonable person could expect them to have all the relevant information to know whether an image was published for more than a handful of their works. Yet, for American creators, if they do not have that information they may have no ability in current law to enforce their rights. Thus, the requirement to declare publication status in the registration becomes a legal minefield for the creators who are least able to navigate it.

Invalidation of the Registration for Incorrect Information

The Copyright Act compounds these difficulties by threatening to invalidate a registration for inaccurate information if “the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate” and would have resulted in a refused registration.⁵² This raises the question of whether an applicant who guesses (because they don’t know) the publication status of the work they seek to register risks having their registration invalidated?

The Nimmer treatise asserts, “courts generally have been most lenient...with respect to any innocent error contained in an application for a registration certificate.”⁵³ Bearing this out in at least one circumstance, the 9th Circuit held a registration valid in spite of incorrect assertions that the registered works were unpublished when, in fact, two had been published.⁵⁴ The court held that “inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless the alleged infringer has relied to its detriment on the mistake....”⁵⁵ The court also took note that in the case at bar “[u]pon learning of its registration error, [the plaintiff] corrected it.”⁵⁶

⁵² 17 U.S.C. §411(b)(1).

⁵³ 2 Nimmer on Copyright §7.20[B][1].

⁵⁴ *L.A. Printex Indus. V. Areopostale, Inc.*, 676 F.3d 841 (9th Cir. 2012).

⁵⁵ *Id.* at 853 citing *Urantia Found. V. Maaherra*, 114 F.3d 955, 963 (9th Cir. 1997).

⁵⁶ *Id.* at 854.

While this seems reasonable, it is cold comfort to many right holders. If right holders are forced to guess as to the publication status as a standard practice, will at least some courts become wary of classifying such serial behavior as “inadvertent?” What if there is an error than the defendant relied upon to its detriment? The right holder’s ability to prevail even against blatant infringement hinges on the state of mind of the defendant. What if the error is not discovered until the actual litigation (a likely scenario), depriving the right holder of the opportunity to cure with a supplemental filing⁵⁷ at the Copyright Office?

The 9th Circuit allowed the case to go forward in *L.A. Printex* because the infringement alleged was of works that were indeed unpublished, although two other works in the registration had been incorrectly identified as unpublished. In *Family Dollar Stores, Inc. v. United Fabrics Int’l*,⁵⁸ different facts led to a different result. There the works that were allegedly infringed had been registered as unpublished when it turned out they had been published. Even in the absence of any finding of intentional fraud, the court invalidated the copyright registration.⁵⁹

The Nimmer treatise also acknowledges that at least one Circuit court suggested that in cases of inadvertent but material omissions on the registration, courts should “deprive plaintiff of the *prima facie* presumption of validity that registration otherwise conveys.”⁶⁰ At best, that would substantially increase the already significant cost and time needed for a plaintiff to prevail in a federal infringement suit.

What is a copyright owner to do? If they register their work(s) as unpublished and it turns out they *were* published, the *Family Dollar Stores* case suggests they will have their registration invalidated. Conversely, if they register as published (and make a

⁵⁷ See 17 U.S.C. §408(d).

⁵⁸ 896 F. Supp. 2d 223 (S.D.N.Y. Sept. 11, 2012).

⁵⁹ *Id.* at 231-234.

⁶⁰ 2 Nimmer on Copyright §7.20[B][1] citing *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 668 n. 5 (3d Cir. 1990).

best-guess as to what the date of publication may have been), they risk inadvertently reducing the scope of their protection, losing the evidentiary benefit of registration, and might still have the registration invalidated. What public policy goal is served by placing creators and copyright owners in such circumstances?

Part III – Solutions

It is clear that the status quo is unnecessary and unjust. The question then is, what is the best solution? Several approaches are possible, some of them complimentary.

Redefine “publication”

If the term “publication” were defined consistently and clearly in the Copyright Act, that would be a helpful step. The undertaking may not be easy as the concept is nuanced, but it is worth the effort.⁶¹ Even if a ‘perfect’ definition proves elusive, surely it can be improved. That increased certainty will benefit everyone who interacts with the American copyright system. Nonetheless, as discussed above, this alone would be an incomplete solution to the problem of requiring designations of publication status on registration applications for those creators who do not know what uses have been made of their works.

Make the designation of publication status in registration optional

An improved definition of “publication” would be welcome, but this alone will not solve the problem for all creators as many still rarely if ever have all the necessary information about the use of their works. Therefore it is imperative that the requirement to designate publication status in their registration be made optional, at least for American authors’ works created after March 1, 1989. Because in such

⁶¹ This paper is not so audacious as to suggest a new definition of “publication.” That should be arrived at through a good faith process involving a full range of stakeholders and with the goal of sustaining the Copyright Act’s purpose of promoting the creation and distribution of works of authorship.

circumstances a declaration of publication is not necessary for the reasons stated above, designating the publication of a work on a registration application should not be a requirement, but should be offered as an additional protection for those creators who want to avail themselves of it.

Allow the registration to survive incorrect designations

Perhaps most fundamental to basic fairness, it is critical to correct the draconian consequence that a mistaken identification of publication status can invalidate the effectiveness of the registration. For American authors, this has the consequence that they cannot enforce their rights in a civil suit in federal court. The current rule harkens back to the injustices of the old formalities. Where both the law and the facts are uncertain but the applicant is held to strict requirements to get the right answer, it is little more than a “gotcha” game against creators. This is contrary to the purposes of the Copyright Act. Of course, a rule could be retained that a material and fraudulent misrepresentation of publication status carries some penalty in order to prevent abuse.

Inadequate approaches

Other, less complete approaches may be put forward. For example, allowing the Register to determine by regulation what must be in a registration application might well result in no change from current practice or vacillating requirements from one Register to another over time. Congress should reject any approach that could continue to result in American creators losing their full ability to enforce their rights over the uncertain law and unknowable facts of publication status.

Part IV – Conclusion

As Congress considers the best legislative framework to promote modernization of the Copyright Office, it should also consider how to measure success in such efforts?

Surely, at least one aspect of definition of success must be the re-engagement of photographers and other visual artists, the largest classes of American creators who currently don't participate in the system – not because they don't care, but rather, because the system and its processes are out of touch with the realities of running a small business. Without the improvements recommended in this White Paper, it can be expected that the largest groups of creators simply will not use the system. Such a decision would not be an indictment of the creators, but of the copyright system that fails to adapt and serve the majority of its potential users.

At present, untold millions of copyrighted works are not registered with the Copyright Office due to the burdens associated with the registration process. The result is that American creators are denied the ability to enforce their rights through civil action in federal court and the public record of copyrighted works is immeasurably diminished. That stands in stark contrast to the purposes of the copyright system. The United States is the only country we are aware of that requires registration as a prerequisite to protecting a creator from theft. As such, it is incumbent upon Congress and the Copyright Office to create a registration system that recognizes and supports the realities of competing in today's world.

The Copyright Office modernization process is a once in a lifetime opportunity to address the inadequacies and inefficiencies this White Paper has addressed. A 'modernized' Copyright Office that holds to unworkable requirements and processes would be little more than a coat of paint on a house with a cracked foundation. The Copyright Office has gone to great lengths to consult with many stakeholders, including creators, as it considers the best path for modernization. Leaders in Congress are now doing the same. It is hoped that this White Paper will add to that wisdom in a way that will open the door to participation in the registration system by those who are now disenfranchised by its impractical demands. Doing so promises to benefit all who interact with the American copyright system and to improve fairness for the foundational actors in the copyright lifecycle: the creators.