

**Before the  
 COPYRIGHT OFFICE  
 LIBRARY OF CONGRESS  
 Washington, D.C.**

<b>In the Matter of</b> <b>Deferred Registration Examination</b> <b>Study: Notice and Request for Public</b> <b>Comment</b>	) ) ) ) ) ) ) )	<b>Docket No. 2021-7</b>  <b>Submitted January 24, 2022</b>
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**COMMENTS OF THE  
 MOTION PICTURE ASSOCIATION, INC. AND RECORDING INDUSTRY  
 ASSOCIATION OF AMERICA, INC.**

**I. INTRODUCTION**

The Motion Picture Association, Inc. (“MPA”) and the Recording Industry Association of America, Inc. (“RIAA”) (together, “Commenters”) are pleased to provide comments in response to the Notice of Inquiry (“NOI”) regarding the Deferred Registration Examination Study, published at 86 Fed. Reg. 70,540 (Dec. 10, 2021) (Docket No. 2021-7).

The MPA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPA’s member companies are: Netflix Studios, LLC, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

The RIAA is the trade organization that supports and promotes the creative and commercial vitality of music labels in the United States, the most vibrant recorded music community in the world. Its membership—which includes several hundred companies, ranging from small-to-medium-sized enterprises to global businesses—creates, manufactures and/or distributes sound recordings representing the majority of all legitimate recorded music consumption in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies.

Commenters' members and their affiliates are heavy users of the Copyright Office's registration system and associated public record. Our member studios and record labels collectively register thousands of works each year. And they make frequent use of the Office's online database and paper-based records, to research ownership of works owned by third parties, for purposes including facilitation of licensing transactions as well as actual and potential litigation. For these reasons, among others, Commenters support a robust, well-functioning registration system that benefits creators, distributors, and the public. As explained below, Commenters are neutral at this time on the question whether the Office should institute a deferred-examination process, though we have significant concerns that counsel in favor of the Office taking a cautious approach, and not proceeding toward such a system unless and until the many questions raised by such a potential system are thoroughly studied and addressed.

## II. THE COPYRIGHT OFFICE SHOULD ADDRESS THE CONCERNS OF PHOTOGRAPHERS AND OTHER VISUAL ARTISTS DIRECTLY.<sup>1</sup>

These proceedings find their origin in the concerns of photographers and other visual artists about the financial burdens imposed on them by the current registration system. Specifically, these creators of high-volume, relatively low-dollar-value works<sup>2</sup> report that registration fees deter them from registering a significant portion of their creations. In other words, under the existing fee structure, they simply cannot afford to register all of their registration-eligible works. And, they say, the group-registration option—created to mitigate the expenses associated with registering large volumes of relatively low-dollar-value works—while providing some benefit, does not adequately address the problem.

These concerns raised by photographers and other visual artists are legitimate. While it may be necessary for the Office to charge fees for registration and related services, these fees should not impose such a burden that they deter legitimate registrations, thus depriving or limiting creators of the ability to enforce their rights when infringed. *See* 17 U.S.C. §411(a) (registration, or denial of registration, a prerequisite to filing an infringement suit); *id.* §412 (limiting recovery of statutory damages and attorneys' fees to suits filed on works registered within specified time frames).

Commenters and their members support efforts by the Office to address the concerns of photographers and other visual artists by lowering the barriers to registering more of their

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<sup>1</sup> *See* NOI, Question 17.

<sup>2</sup> Commenters have great respect for photographers and other visual artists, and mean no disrespect by this description, which simply reflects the reality that different categories of creative works have different economics associated with their creation and exploitation. A registration fee may represent a significant cost when compared to the economic value of a single photograph, while that fee is typically small in comparison to the economic value of a major motion picture, sound recording, book, or software program.

works<sup>3</sup>, and making it easier to enforce their rights, which was the major impetus behind the recently enacted CASE Act.<sup>4</sup> This is essentially a financial problem; registration fees are too high for these creators to afford to register many of their works. Thus the simplest, most direct solution to the problem is financial as well: the cost of registering photographs and similar works needs to be lower. Commenters believe that the best way to do this is directly: the Office should study whether the fee structure can be adjusted to make it cheaper to register high volumes of low-dollar-value works. This might be done by simply lowering the registration fees for photographs and similar works. Or the rules governing group registration might be amended to permit the registration of more works, at lower cost, by relaxing some of the existing eligibility requirements.<sup>5</sup> Or some combination of the two may be in order. Commenters do not express a view here on the specifics of any fee adjustment or change in the group-registration rules, as that would be best done in collaboration with the affected groups, and recognize that, like all government agencies, the Office faces budgeting constraints. However, Commenters believe that the financial problem faced by photographers and other visual artists is best addressed with a financial solution—which will target the problem more precisely, while avoiding the complications and potentially harmful consequences of a major structural change to the registration system, as detailed below.

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<sup>3</sup> *See id.*, Question 1.

<sup>4</sup> Because the CASE Act allows creators to bring an enforcement before the CCB while an application for registration is pending, *see* 17 U.S.C. §1505, 37 C.F.R. §221.1(b), the CASE Act seems to go a long way towards solving the same problem that deferred examination would solve. Given that, it may be most efficient for the Office to wait until the CCB is up and running before considering another solution to the same or similar problem.

<sup>5</sup> *See* <https://www.copyright.gov/eco/help/group/grpph.html> (“Group Registration for Published Photographs (GRPPH)”); <https://www.copyright.gov/eco/help/group/gruph.html> (“Group Registration for Unpublished Photographs (GRUPH)”).

### **III. POTENTIAL DRAWBACKS TO A DEFERRED-EXAMINATION SYSTEM**

Commenters understand that a deferred-examination system has potential benefits, primarily to photographers and other visual artists for whom the current registration fees present a significant financial hurdle to registering many of their works. However, such an unprecedented and fundamental change to the registration system could have unintended and unanticipated negative consequences, some of which we highlight below, and which would need to be addressed before Commenters could agree to remain neutral on the overall proposal.

#### **A. Potential for Abuse, Fraud, and Confusion<sup>6</sup>**

Commenters anticipate that owners of copyright in works submitted for deferred examination, but for which a registration certificate has not yet issued, will seek to enforce their rights against alleged infringers through cease-and-desist or claim letters. And they would likely cite the relevant works' application status, perhaps by reference to a Copyright Office-issued unique identifier for that application, in such letters. Such a practice risks falsely and improperly suggesting to the recipients of such letters that the Copyright Office has indeed conferred registration status on the work at issue, including the associated ability to sue, despite the fact that an application in deferred-examination status does not—and cannot—constitute registration of the work. 17 U.S.C. §411(a); *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881 (2019) (ability to sue under Section 411(a) does not accrue until the Copyright Office has issued registration certificate, or refused to do so). While Commenters understand that the vast majority of photographers and other creators act in good faith to combat infringement of their works, the abusive tactics of some counsel demonstrate that concerns about fraud and other improper tactics are well-justified. *See, e.g., Usherson v. Bandshell Artist Mgmt.*, No. 19-CV-

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<sup>6</sup> *See id.*, Question 15.

6368 (JMF), 2020 WL 3483661 (S.D.N.Y. June 26, 2020) (imposing sanctions on attorney Richard Liebowitz and his law firm for abusive tactics representing photographers in copyright matters, including “repeated violations of court orders and outright dishonesty, sometimes under oath”).

To avoid confusion about the status of works that are in deferred-examination status, the Office would need to make crystal clear in the public record that such works have *not* been registered, and do *not* enjoy the benefits of registration.<sup>7</sup> Search-results and other pages on the Copyright Office website providing public information about works under deferred-examination status should prominently state this fact, through bold, large-font labels such as **“THIS IS NOT A COPYRIGHT REGISTRATION. THIS WORK HAS NOT BEEN REGISTERED BY THE COPYRIGHT OFFICE, AND DOES NOT ENJOY ANY OF THE BENEFITS OF COPYRIGHT REGISTRATION.”** Such a label would be removed only if the Office ultimately examines the work and issues a registration certificate. In addition, the unique identification number assigned to a deferred-examination application should include a prefix (e.g., “DEF”) to highlight that it is not a registration number.

#### **B. Less Fee Revenue for the Copyright Office<sup>8</sup>**

Commenters are concerned that a deferred-examination system could result in less revenue for the Copyright Office, which could undermine its ability to adequately fund existing services, including, but not limited to, registration services. Whether introduction of such a system does indeed lead to reduced revenue depends on at least four variables: 1) the fee charged for both deferred-examination applications and the later activation of such applications; 2) how

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<sup>7</sup> See *id.*, Question 12.

<sup>8</sup> See NOI, Question 6.

many creators who now pay for full registrations will instead opt for deferred examinations; 3) how many deferred-exam applications will be filed by those who would not otherwise file applications, albeit for a lower fee; and 4) how many deferred examinations will later be converted to full registrations. It would be impossible to predict with any degree of precision the potential financial impact of a deferred-examination system without a rigorous study that makes well-informed predictions about the answers to such questions (and potentially others), and Commenters believe it would be imprudent to introduce such a system absent a clear picture of its likely financial impact, including the effect on the Office’s existing activities. Commenters recommend that, if the Office is inclined to entertain the creation of a deferred-examination system, it retain a qualified consulting firm to undertake the necessary economic analysis to properly set any fees, as it has previously done.<sup>9</sup> Such a step would also be consistent with the Office’s goal, announced in its recently released Strategic Plan, of “enhance[ing] the development and use of data as an evidentiary foundation for policymaking.”<sup>10</sup>

**C. How should deferred examination operate in connection with an application to register multiple works?<sup>11</sup>**

Commenters believe that, if there is to be a deferred-examination option, applications to register multiple works at once (i.e., group registrations) must be treated as one application (and registration) throughout the process. If an applicant files a deferred-examination application for a group of works, when and if the applicant (or its successor) seeks examination, it must do so for the entire application. Allowing an applicant to pick and choose individual works within a group-

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<sup>9</sup> See, e.g., Booz | Allen | Hamilt, U.S. Copyright Office, Fee Study (2017), available at [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_q&a.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_q&a.pdf).

<sup>10</sup> United States Copyright Office Strategic Plan 2022 – 2026 (Jan. 20, 2022), at 9, available at <https://www.copyright.gov/reports/strategic-plan/USCO-strategic2022-2026.pdf>.

<sup>11</sup> See NOI, Question 5.

registration application to be examined would introduce additional complexity and potential for confusion and mistake into an already complex system, resulting in deferred-examination applications where some of the constituent works *have* actually been examined, and degrading the accuracy of the public record. The Office must avoid such a result. Again, we believe that addressing the existing issues with group registration for photographs and works of visual art is a better, more tailored solution to the underlying problems that a deferred exam option is intended to address.

**D. How would the recordation process apply to works in deferred-examination status, and to such works post-registration?**

The Copyright Act provides that “[a]ny transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office.” 17 U.S.C. §205(a). The statute does *not* require that a copyright be registered in order for a document pertaining to it to be recorded. However, the provision of the Act stating that “[r]ecordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document” does not apply unless “registration has been made for the work.” *Id.* §205(c)(2).

Any deferred-registration process would need to specify that works in deferred-examination status—which, to emphasize, are not registered—do not enjoy the benefits of constructive notice. *Id.* But what about works whose application was initially for deferred examination, but eventually became registered? Does any recordation pertaining to such a copyright retroactively confer constructive notice back to the effective date of registration (“EDR”), which might have been decades—even more than a century—earlier? This and other complex questions—some of which will not occur to anyone before many years of experience with such a system—give Commenters great pause.



#### **IV. THE PARAMETERS OF A DEFERRED-EXAMINATION PROCESS**

As noted above, *see supra* Section II, Commenters believe the Office should address the concerns of photographers and other visual artists by directly addressing the financial burdens of registration through potential changes to the fee structure and/or the group-registration option.

After careful consideration of the pros and cons of a potential deferred-examination system as outlined in the NOI, Commenters remain neutral, though cautious, on such a proposal. Below, we highlight the parameters of such a system that would be necessary to keep it from upsetting the well-settled expectations of various stakeholders within the copyright ecosystem, and urge the Office to proceed cautiously, to minimize the possibility of harmful and unintended consequences that could result from such a significant change in the registration process.

As noted in the NOI, proponents of a deferred-examination option envision that such a system would work as follows:

- (1) An applicant could submit the application materials for full registration at a discounted fee;
- (2) the Office would not immediately examine any of the materials;<sup>12</sup>
- (3) the Office would still ingest information about the unregistered work into the public catalog, retain the deposit, and make it available for the Library's collections;
- (4) if later requested, for an additional fee, the Office would examine the application materials and decide whether or not to register the work;
- and (5) if the Office registered the work, then

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<sup>12</sup> While the Office would not, at this stage, conduct a full examination, it seems that it would be necessary to conduct a cursory check to make sure that the application includes the necessary fee and deposit copies. It would not be fair, of course, for an applicant to obtain the benefits of an EDR matching the date of submission of a deferred-examination application if it omitted these basic features of a completed application. To be clear: at this initial stage, the Office would not determine whether the work at issue is eligible for registration. *See* NOI, Question 7.

the statutory benefits of registration would attach, with an EDR reflecting the date when the original deferred examination application materials were received.<sup>13</sup>

Assuming a deferred-examination system does not depart significantly from the steps outlined above, Commenters would be neutral as to the creation of such a system.

Commenters appreciate the financial burden that registration fees impose on creators of high-volume, relatively low-dollar-value works (e.g., photographs), and which currently deters them from registering some portion of their works. If a deferred-examination system results in the registration of a greater proportion of works in the marketplace, such a move would benefit both creators and users of such works, as registration facilitates legitimate licensing activity by assisting potential licensors and licensees in identifying and locating each other.<sup>14</sup>

However, any such novel system must be carefully cabined so as not to undermine or otherwise harm the existing registration system and the expectations associated with it. If implemented, deferred examination should remain the exception, and not become the norm. Consistent with this principle, Commenters believe a deferred-examination system must include the following features in addition to those noted *supra* at 9-10:

- **Pilot program**. Given the uncertainties such a novel system would introduce, Commenters believe the Office should first test out such a process by making it a pilot program lasting two years. Eighteen months in, the Office should issue a notice of inquiry seeking input regarding stakeholders' experience with the system, both as registrants and users of copyrighted works. Based on the responses, the Office could modify the system

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<sup>13</sup> NOI, 86 Fed. Reg. at 70,541-42.

<sup>14</sup> See NOI, Questions 1-2.

to address any shortcomings, or even terminate it if experience shows that it has resulted in harm to the copyright system.

- **Limit on categories of eligible works.**<sup>15</sup> Based on past stakeholder submissions, it appears that the proponents of a deferred-examination option consist primarily of photographers and creators of other pictorial and graphic works. Given the novelty of such a system, the likelihood of unintended and unanticipated consequences, and the lack of demonstrated need for it beyond those categories of works, any such system should be limited to those categories. If, at a later time, creators of additional categories of works believe that they would benefit from deferred examination without undermining the traditional registration system, they may seek to broaden the scope through a rulemaking.
- **Carefully calibrated fees.**<sup>16</sup> Commenters understand that the fees for a deferred examination application would be discounted from the fees for a normal application. However, the discount must not be so great that the cost of traditional application appears exorbitant in comparison, and deferred examination thus becomes the norm rather than the exception. Moreover, the fees must be calibrated to avoid a loss of revenue to the Office, which could lead to a reduced headcount of examiners and a resulting increase in the backlog of registration applications. To be clear: Commenters would oppose a deferred-examination option if it harmed the traditional registration system. As suggested above, *see supra* at 7, Commenters recommend that, if the Office is inclined to entertain

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<sup>15</sup> See *id.*, Question 4.

<sup>16</sup> See *id.*, Question 6.

the creation of a deferred-examination system, it retain a qualified consulting firm to undertake the necessary economic analysis to properly set any fees.<sup>17</sup>

- **Existing statutory restrictions must remain.** Commenters believe that a deferred-examination option could be implemented via regulation, without statutory amendment.<sup>18</sup> Consistent with this principle, if a deferred-examination system is implemented, one could still not initiate an infringement lawsuit “until...registration of the copyright claim has been made” or refused, 17 U.S.C. §411(a), as explicated in *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S.Ct. 881 (2019).<sup>19</sup> The limits on awards of statutory damages and attorneys’ fees in Section 412 must apply in the deferred-examination context as well.
- **Time limit for requesting examination.**<sup>20</sup> A deferred-examination application should lapse after five years if the registrant has not sought examination. In the event of lapse, the public record should indicate that the applicant sought deferred examination, but that the application has lapsed due to a failure to request examination. The Office should not be required to return any deposit copies submitted pursuant to a deferred-examination application. Following a lapsed application, the applicant may submit a new registration

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<sup>17</sup> See, e.g., Booz | Allen | Hamilton, U.S. Copyright Office, Fee Study (2017), available at [https://www.copyright.gov/rulemaking/feestudy2018/fee\\_study\\_q&a.pdf](https://www.copyright.gov/rulemaking/feestudy2018/fee_study_q&a.pdf).

<sup>18</sup> See NOI, Question 3.

<sup>19</sup> Commenters also believe that a work in deferred-examination status should not provide the basis for enforcement by U.S. Customs and Border Protection. See NOI, Question 16. As noted at footnote 52 of the NOI, “Congress has [] required the CBP to implement a process by which it will ‘enforce a copyright for which the owner has submitted *an application* for registration under title 17 with the United States Copyright Office, to the same extent and in the same manner as if the copyright were registered with the Copyright Office.’ 19 U.S.C. 4343 (emphasis added).” However, a deferred-examination registration application should not count as “an application,” because the applicant has not yet actually sought registration.

<sup>20</sup> See NOI, Question 9.

application (but **not** a new deferred-examination application), with an EDR corresponding to the new application date, not the original deferred-examination application date.

Commenters believe that allowing more than five years between the submission of an initial application and examination risks a multitude of problems with applications and subsequent registrations that could result in a tainted and inaccurate public record.<sup>21</sup> It would create a system of indefinite uncertainty, where the public record is cluttered with a category of entries in a limbo status, where it is not known whether they ever will be registered, or are even registrable. Under the existing system, where examination occurs within months of the application's submission, examiners can readily communicate with applicants to seek necessary information or documentation. Contact information remains current, memories fresh, and documents accessible. However, were that gap of months to become years or even decades, which would be the case under the proposals of some deferred-examination proponents, the examination system would become much more fraught. The individual who filled out the application might no longer be at his or her job; he or she might even have died, or the entity that was the initial owner of the copyright may have sold it or no longer exist. Any memory of the application and the information in it may have faded. And any documents relevant to the application may be difficult or impossible to retrieve. At the very least, the kind of routine communication between examiners and submitters that takes place under the existing system would become much more complex and time-consuming, requiring

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<sup>21</sup> See *id.*, Question 12.

substantially more examiner attention and resources, and likely lengthening processing times, including for traditional applications.

It is imperative that the Office not reverse the hard-won gains it has made in recent years in reducing the application backlog. Commenters have grave concerns that allowing a gap of more than five years between the initial application and examination would do just that, and strongly urge the Office to reject any proposal that risks that harmful result.

- **Only applicants (or their successors) and targets of demands may request examination.**<sup>22</sup> Commenters believe that, in addition to the applicant and its successor, recipients of a demand or claim letter alleging infringement of a work in deferred-examination status should be permitted to request examination. In such a circumstance, the applicant would need to cooperate with the Office in the examination; if it fails to do so, the Office should deny the application. It would be fundamentally unfair for targets of such demand/claim letters to be required to evaluate their merits without knowing if the work is indeed eligible for registration. For the same reason, a party that files an action in federal court seeking a declaration of non-infringement regarding a work in deferred-examination status should be permitted to request examination.
- **No “line-jumping”.** If a deferred-examination applicant requests examination, that application should start at the end of the line of applications (both traditional and deferred-examination) that await review by an examiner.

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<sup>22</sup> See *id.*, Question 8.

Commenters appreciate this opportunity to provide our views in response to the NOI. We look forward to providing further input and working with the Copyright Office going forward.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Sheffner". The signature is stylized with a large initial "B" and a long horizontal stroke at the end.

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A handwritten signature in black ink, appearing to read "Susan Chertkof". The signature is written in a cursive style.

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