

**Before the
LIBRARY OF CONGRESS
United States Copyright Office**

**In the Matter of Request for Comments
by United States Copyright Office
Concerning Online Publication**

Docket No. 2019-7

Submitted June 15, 2020

Reply Comments of the Motion Picture Association, Inc.

Introduction

The Motion Picture Association, Inc. (“MPA”) welcomes this opportunity to respond to comments filed during the initial comment period regarding the Copyright Office’s (the “Office”) Notification of Inquiry (“NOI”) (Docket No. 2019–7, 84 Fed. Reg. 66328 (Dec. 4, 2019)) concerning online publication in United States copyright law and practice. We will not reiterate each of our arguments from our initial comments filed on March 19, 2020, but will only respond to certain points made by other commenters in their initial comments. The following is organized by issue rather than following the question numbers in the NOI.

1. Statutory Amendment

We reiterate the view expressed in our initial comments that the existing statutory definition of “publication” found in 17 U.S.C. § 101 has not presented significant problems for MPA’s members, and we do not believe it requires amendment. In addition, we believe an amendment will likely have unseen consequences for the rest of the Copyright Act and could do more harm than good. This view seems to be shared by most other categories of creators, as expressed in the initial round. The exception is photographic and visual artists, who seem to face unique and difficult issues regarding how to assess whether and when their works are published. Were a statutory amendment to be considered, a more limited amendment for visual arts might be a reasonable approach.

2. Regulatory Guidance and Educational Materials

We welcome the Office issuing additional regulations and educational materials that will assist registrants. To the extent the issue regarding publication presents unique challenges to photographic and visual artists, we suggest the Office hold a roundtable for this group to better assess their issues and consider ways address their concerns. MPA is certainly willing to consider any regulatory change that will assist the visual-artist community that does not negatively impact other groups. We also strongly support the suggestion that the Office create additional educational materials including online “clickable” and “drop down” tools to help applicants navigate the registration process.

3. Presumption of Publication

We disagree with the Authors Alliance (a group that seems to represent largely legal academics who advocate for minimal copyright protections) that any work posted online should be considered published unless that platform has technological mechanisms in place to prohibit copying. This suggestion is problematic both logistically and legally. First, most platforms have some amount of protection against copying, but many of those systems can be easily circumvented. Must the platform have effective protections against copying, or will any kind of DRM be sufficient? The adequacy of a platform's technology should not be a factor in assessing whether a work is published. Second, this suggestion does not give sufficient weight to the copyright owner's right to authorize further distribution. The rules online should mirror that of the offline world: a work is published when the copyright owner expressly licenses it for further distribution. We recognize that this may have the effect that the works on some platforms will be published and the works on similar platforms may not be. While we appreciate the appeal of a bright-line rule, we do not believe creating presumptions in the absence of clear expressions of authorization by copyright owners is appropriate.

Finally, we disagree with the concern expressed by the Authors Alliance regarding section 412 of the Copyright Act, which permits copyright owners to claim statutory damages for infringements occurring before publication, provided the work was first published no more than three months before registration, and the acts of infringement occurred during that period. The Authors Alliance posits that this rule encourages rightsowners to distribute their works online and only register them later, claiming some more recent distribution constituted publication. The Authors Alliance offers no evidence that copyright owners engage in such high-risk gamesmanship, which would obviously be subject to challenge by the defendant in any infringement litigation. More importantly, any concerns about statutory damages or untimely registrations related to the operation of section 412 should not be addressed by fashioning presumptions regarding publication that will serve to diminish copyright owners' rights in unpublished works.

4. Publication "Online"; Nation of First Publication

As we noted in our initial comments, we are concerned with the potential for abuse if an applicant is permitted to register a work as "online," and then argue for a place of publication later. However, we agree with the Alliance for Recorded Music that one idea worth exploring is to permit a "deemed published" option that would allow applicants to choose to register their works as published even if they are unsure what the correct publication status is. Importantly, this option must be chosen by the copyright owner and not presumed merely from the act of posting a copy of a work online. Moreover, this option would satisfy our concern about abuse only if the registrant were nevertheless required to choose a nation of first publication. With regard to that issue, we endorse the Kernochan Center's suggestion that the rules of personal jurisdiction can be applied in selecting the most appropriate country – and suggest that the Copyright Office can supply additional guidance to applicants through the *Compendium* and other educational materials to help them select the best location.

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The MPA appreciates the Copyright Office's attention to the important issues addressed in this inquiry and welcomes the opportunity to discuss them further.

Respectfully submitted,



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