

**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 March 19, 2020

Comments of the Motion Picture Association, Inc.

Introduction

The Motion Picture Association, Inc. (“MPA”) welcomes this opportunity to respond to the Copyright Office’s 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. In general, the MPA believes that the Copyright Act, together with the guidance provided in Chapter 1900 of the *Compendium of U.S. Copyright Office Practices* (3d ed. 2017) (the “*Compendium*”), establishes a relatively straightforward set of rules concerning publication as applied to major motion pictures and television programs as they are currently distributed. However, we are aware the law may not be as clear in other situations, which poses a barrier to registration for many copyright owners. We therefore support the Copyright Office providing guidance to make registration more user-friendly. In addition, the MPA’s members rely on the factual information regarding publication in copyright registrations (specifically the date and location of first publication) for various purposes, including in litigation and in calculating termination dates under 17 U.S.C. §203 and §304(c). We therefore believe there is value in preserving the requirement to provide that information in a copyright registration application, and in having that information be as accurate as possible. For all of these reasons, we support the Copyright Office providing additional guidance on the topic of publication, which we believe can be accomplished through the Copyright Office’s existing regulatory power and through additional discussion in the *Compendium* rather than through statutory change. Our answers to the specific questions posed in the NOI are included below.

- 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.**

We acknowledge the advice in the *Compendium* that works made available to the public for download with the authorization of the copyright owner are “published,” while works only

available for performance or display (whether or not an *unauthorized* copy can be made) are not. Typically, motion pictures and television programs produced today by MPA studios are made available in hard copy or as a download (in addition to streaming/broadcast/theatrical release). Accordingly, these works are “published,” and the MPA’s members register them as such. However, additional guidance would be useful, to account for works made available only as on-demand transmissions (streams, without the right to download even temporarily, or broadcasts). To that end, we favor the Copyright Office providing additional guidance on the questions raised below, especially as new types of platforms and distribution systems evolve.

Another aspect of publication that could benefit from additional clarification is the text in section 101 of the Copyright Act providing that when the copyright owner has made an offer to distribute copies “to a group of persons for purposes of further distribution, public performance or public display,” such offer constitutes publication. This scenario refers to a wholesale distributor/producer of content offering its work to a group of retail partners for the purpose of further disseminating the work. Today, modern production companies often offer a given work to a single retail outlet or platform for exclusive dissemination online, and sometimes make the work available themselves. Those scenarios should not result in a different publication status than the same offer to a group of retail outlets. Clarifying this point in the *Compendium* would be a helpful addition.

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;

The MPA’s members do not typically post their content on sites where the rights and permissions are unclear, but understand this may be a common practice for others. Accordingly, additional guidance on this topic would be helpful. In this regard, we suggest that any authorization to distribute or reproduce an author’s work must be explicit. The right of first publication –the ability to determine whether, when, how, and to whom a work is first made available to the public – is one of the most important of a copyright owner’s rights. In addition, as discussed in the NOI, the decision to publish a work changes its status under copyright law in various ways. This decision should not be triggered simply through posting a work on a site that lacks an express prohibition against copying. Rather, the better rule is that a work should only be considered published if the copyright owner expressly permits copying. Further, copyright owners frequently make their works available on sites they do not control. When the terms and conditions are silent on the right of others to make reproductions, or the terms of service are not clear on this point, “publication” should not result simply from posting on such a site.

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

Under current practice, the MPA members' motion pictures and television programs are typically made available to the public for download or embodied in physical copies, in addition to online streams/broadcasts. The works are also typically offered to retail partners for further distribution and performance. These events do not occur simultaneously and therefore we agree that some additional clarity on the issue of the publication date would be welcome.

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;

Restrictions placed on the distribution of a work by the copyright owner should be given effect in determining whether a work is published, provided the restrictions are clear. If the copyright owner restricts the redistribution of the work until some condition is met, the work is not "published" until that condition is satisfied. We are not aware of situations in which these rules are in dispute, but to the extent ambiguity exists, we would favor the Copyright Office issuing further guidance clarifying that publication has not occurred if distribution has occurred without the authorization of the copyright owner (including as limited by contractual conditions).

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

Advertisements are generally not considered to be offers for sale *See, e.g.,* Arthur Linton Corbin & Joseph M. Perillo, *Corbin on Contracts* § 2.4 at 116 (rev. ed. 1993). Thus, the advertising of works online should generally not be considered an offer to distribute copies, and likewise would not trigger "publication" status.

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?

As noted in the NOI, the place of publication has important implications for a copyright owner's ability to bring suit in the United States. Accordingly, there would be too much opportunity for abuse in allowing applicants to simply list the location as "online," and then argue for a particular nation of first publication later. We welcome the opportunity to discuss further the most appropriate default rule that should govern the place of first publication for online works.

- 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?**

The Office's proposed solution would seem to remedy situations in which a copyright owner could not prosecute its claim because of a mistake in a group registration that combined published and unpublished works. *See, e.g., Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC*, 925 F.3d 1140 (9th Cir. 2019). While we are not aware how frequently this problem arises, we favor a solution that would help alleviate the harsh outcome of that case. Allowing the copyright owner to retroactively partition its group registration seems an acceptable solution.

- 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?**

The MPA's members generally do not find it necessary to register published and unpublished works together but understand that smaller creators would be encouraged to register more works if this option were available. We have no objection to that option being made available if the Copyright Office had the technical capability to of handling group registrations in that fashion. The benefit would presumably be greatest were this option adopted along with the concept discussed in Question 4, *i.e.*, that a copyright owner could retroactively correct the publication status of a work in a group if it erred in the original filing.

- 6. [Missing]**

- 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?**

Section 409 of the Copyright Act clearly requires that an application contain the date and nation of first publication of the work at issue. Should Congress decide that provision is no longer desirable, either entirely or with regard to certain classes of works, the Copyright Act would need to be so amended. However, we do not favor this approach. Rather, we

believe the publication status of a work is relevant in many situations, and that registration applications should include this information. We support making the registration process as easy as possible for all copyright owners and hope this effort by the Copyright Office to provide additional guidance on issues surrounding publication will help in that regard.

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?

The MPA's members do not find the determining the publication of works in the online environment difficult in most cases, and therefore do not believe amending the Copyright Act on this point is necessary. That said, we will consider in good faith amendments to clarify the definition of "publication," but do not wish to suggest particular changes at this time.

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The MPA appreciates the Copyright Office's attention to the important issues addressed in this inquiry. We welcome the opportunity to discuss with the Office the registration practices of our industry and ways the law can be clarified for the benefit of all registrants and users of the registration system.

Respectfully submitted,



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