

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

In the Matter of Registration Modernization)))))	Docket No. 2018-9 Submitted January 15, 2019
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**COMMENTS OF THE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.**

I. INTRODUCTION

The Motion Picture Association of America, Inc. (“MPAA”) is pleased to provide comments in response to the Notification of Inquiry (“NOI”) regarding Registration Modernization, published at 83 Fed. Reg. 52,336 (Oct. 17, 2018) (Docket No. 2018-9).

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPAA’s member companies are: Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., 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 MPAA’s members are high-volume users of the Copyright Office’s registration and recordation systems, and also rely heavily on the Office’s hard-copy public records and

online database. The MPAA's members are also frequent licensors and licensees of copyrighted works, and rely on the Copyright Office's systems in the course of conducting a wide variety of transactions. As such, we thank and commend the Office's efforts to modernize its systems. These modernization efforts will benefit not just the MPAA's members, but the entire ecosystem of motion picture and television producers, financiers, licensors, and licensees, who rely on a well-functioning copyright system that enables the production and wide distribution of content that entertains and informs the public.

The MPAA applauds the move toward a modernized electronic registration (and recordation) system. And we thank the Office for its robust outreach to stakeholders, both through formal proceedings including this NOI, as well as less formal means such as usability testing and other consultation with users of its systems. We note below where we believe follow-up meetings regarding certain technical topics would be helpful for both the Office and the MPAA's members.

II. RESPONSES TO QUESTIONS IN THE NOI

1. New Solutions for Delivering Application Assistance: How should the Office integrate in-application support and assistance to users of the electronic registration system?

The MPAA understands the challenge in designing an electronic registration system that will be used by a wide spectrum of users, ranging from high-volume, sophisticated corporate entities including our members, to individuals who may register a single work in their lifetime. Obviously, different users will have different needs. The most important tool for ensuring that users of all stripes can complete online registration applications accurately and efficiently will be a detailed, clearly-written, plain-English, set of instructions and Frequently Asked Questions ("FAQs") that will guide applicants through the process. The instructions and FAQs should also

link to the relevant circulars and sections of the Compendium of U.S. Copyright Office Practices, which will provide more granular guidance, particularly for sophisticated users. Importantly, the instructions and FAQs should not be treated as static documents, but should be frequently updated and revised to address user questions and concerns that may not have been anticipated at the outset.

It is the MPAA's expectation that well-prepared written materials provided in connection with the online application will answer the vast majority of user questions, thus minimizing the need for live chat, telephone, and other resource-intensive means of communicating with users. That said, we understand that users reasonably expect to be able to interact with Office employees knowledgeable about the registration process, and of course have no objection to the Office providing such services in a manner consistent with its budgetary constraints.

2. Electronic Applications and Payments: Should the Office mandate the use of electronic applications and payments, and eliminate the paper application and payment options via check or money order?

The MPAA supports the mandate for electronic applications and payments, with a few caveats.

As for electronic applications, we appreciate the Office's Final Rule published in May 2017¹ announcing revisions to 37 C.F.R. Part 201, and are hopeful that the procedures established in the revised regulations will adequately address situations where the Office's online systems are inaccessible, by providing a means for the Office to establish as the effective date of a registration, "the date on which the Register determines the [applicable] material would have been received but for the disruption or suspension of services."² That said, we believe that the

¹ See 82 Fed. Reg. 22,886 (May 19, 2017).

² 37 C.F.R. §201.8(b).

Office should still permit the filing of paper applications in certain time-sensitive circumstances (e.g., imminent or ongoing litigation) where the online system is unavailable for technical or other reasons, such as a government shutdown. We also believe the system should accommodate those who, due to economic or geographic circumstances, do not have ready access to computers and the internet. It would be appropriate for the Office to require those seeking to submit paper applications to sign a “certificate of need,” stating with specificity the reason they are unable to use the online system, to help ensure that paper applications are used only when truly necessary, and that online applications remain the norm.

Regarding electronic payments, the MPAA reiterates the comments it submitted on this topic in July 2017 in response to the Notice of Proposed Rulemaking regarding Modernizing Copyright Recordation.³ The MPAA’s members strongly prefer that the Office continue to permit users of the registration and recordation systems to pay using deposit accounts. Forcing a switch to Pay.gov would place a heavy burden on the MPAA’s members, and would significantly disrupt the sound tracking and accounting systems they currently employ. The deposit account system works well for high-volume users like the MPAA’s members. Significantly, the deposit account system provides detailed monthly statements listing each transaction for each account, including the date, Pay ID, title, amount, and type of registration or recordation. These monthly statements facilitate good record-keeping, by enabling the MPAA’s members to track and attribute specific payments to specific projects and business units within their larger companies.

By contrast, Pay.gov does not provide monthly statements. Rather, it merely sends the user individual email receipts summarizing each transaction. While Pay.gov may work well for individual, one-time transactions—e.g., reserving a spot in a campground at a national park or paying

³ MPAA Comments in Docket No. 2017-7, at 2-3.

a fine for a parking ticket on federal property—it was not designed for, and is particularly ill-equipped to handle, high-volume transactions, like the several hundred registrations and recordations the MPAA’s members may file each month.⁴ Moreover, the amount of data entry required for a transaction paid by deposit account is vastly less than that for a transaction paid via Pay.gov. At least as currently configured, paying via deposit account requires just two clicks: 1) selecting the account name; and then 2) clicking “OK.” By contrast, with Pay.gov, the user must, *for each individual transaction*, enter: 1) name; 2) billing address; 3) city; 4) state; 5) zip code; 6) credit card type; 7) credit card number; 8) security code; and 9) expiration date. Entering such information manually for each of the thousands of individual transactions each of the MPAA’s members engage in with the Copyright Office each year would place an enormous burden on those who perform these tasks.

3. Electronic Certificates: Should the Office issue electronic certificates and offer paper certificates for an additional fee?

The MPAA has no objection to the Office issuing electronic certificates in the normal course, with paper certificates available for an additional fee. It is important, however, that such electronic certificates be accorded the same degree of authenticity as the existing paper certificates, including when, for example, the electronic certificates are printed for inclusion in a legal filing. Put another way, registrants should not have to pay an extra fee to obtain a certificate that has the same legal effect as the existing paper certificates, which are provided under the basic filing fee. The MPAA supports the NOI’s suggestion that the electronic certificates include “appropriate watermarks or other security measures needed to ensure authenticity,” and urges the

⁴ Pay.gov does provide additional reporting functionality to those using the system as a “logged in member,” as described here: https://www.pay.gov/WebHelp/HTML/payments_viewing.html. However, at least as Pay.gov is currently integrated with eCO, eCO users may only use Pay.gov as a “guest,” not as a “member,” so that reporting functionality is not available to eCO users. Furthermore, even if applicants were able to use Pay.gov as “members,” the reporting functionality of that system would remain significantly inferior to that of the deposit accounts system.

Office to research what features in analogous federal government electronic documents are necessary to ensure acceptance by courts and other government entities.

4. Dynamic Pricing Models: Should the Office replace the Single, Standard, and group applications with a dynamic pricing model that scales fees based on the number and type of works submitted for registration?

The MPAA does not object, in principle, to a dynamic pricing model that would scale fees based on the number and type of works submitted for registration. The devil, of course, is in the details. Fees must be calibrated in such a way to avoid causing small companies and individual creators to reduce the number of works that they register, a result that would harm both creators and prospective users of copyrighted works. As the MPAA stated in its comments in connection with the Office’s open rulemaking regarding a new fee schedule,⁵ the MPAA supports efforts, such as those proposed by the Copyright Alliance, that seek to mitigate the effect of fee increases on small companies and individual creators, and minimize disincentives to registration.⁶ We will evaluate any concrete proposals for dynamic pricing models in light of these concerns.

5. Authorship Statements and Administrative Classifications: Should the Office eliminate the Author Created and Nature of Authorship sections of the application, and instead, require the applicant to identify the work being submitted for registration, rather than the elements of authorship contained in the work?

The MPAA opposes elimination of the “Author Created” and “Nature of Authorship” sections of the application. Furthermore, we do not support the suggestion that the Examiner should determine the nature of authorship, since the applicant is in the best position to make this determination.

⁵ NPRM re Copyright Office Fees, 83 Fed. Reg. 24054 (May 24, 2018) (Docket No. 2018-4).

⁶ See Comments of the Copyright Alliance, Docket No. 2018-4, at 19-20.

The MPAA believes that the current approach used in the eCO application—where applicants check boxes indicating the nature of their contribution to the work being registered, and have an “Other” option for material not covered by one of the existing choices—works well. Generally speaking, a structured approach, where applicants choose from specific options provided by the form (with an option for “Other”), or from a drop-down menu, promotes consistency and minimizes potential error. We see no reason for a change in this approach, nor for elimination of the referenced sections of the application, nor for changes in the existing classifications.

To the extent that the Office believes that users may be confused about the existing options describing the claimed (or disclaimed) material, the MPAA does not object to revisions to the wording or categories, and again suggests that emphasis be put on drafting clear, easy-to-understand instructions and FAQs to explain the meaning of the relevant terms.

6. Derivative Works: Should the Office require users to explicitly identify whether a work submitted for registration is a derivative work?

The new online application should maintain the approach of the existing eCO system, which provides the opportunity to check boxes for material excluded from the claim, and other boxes for new material included in the claim—without explicitly requiring the applicant to state whether the work being registered is a derivative work:

Limitation of Claim

<< Back
Continue >>
Save For Later

Complete this screen to [limit your claim](#) if this work contains or is based on previously registered material, previously published material, material in the public domain or material not owned by this claimant. The purpose of this section is to exclude such material from the claim and identify the new material upon which the present claim is based. **If your work does not contain any preexisting material, click "Continue" to proceed to the Rights and Permissions screen.**

Material Excluded:	Previous Registration:	New Material Included:
<input type="checkbox"/> Lyrics <input type="checkbox"/> Music <input type="checkbox"/> Musical Arrangement <input type="checkbox"/> Text Other: <input style="width: 80px;" type="text"/>	1st Prev. Reg. #: <input style="width: 100px;" type="text"/> Year: <input style="width: 60px;" type="text"/> 2nd Prev. Reg. #: <input style="width: 100px;" type="text"/> Year: <input style="width: 60px;" type="text"/>	<input type="checkbox"/> Lyrics <input type="checkbox"/> Music <input type="checkbox"/> Musical Arrangement <input type="checkbox"/> Text Other: <input style="width: 80px;" type="text"/>

We believe—as we presume the Office believes, given its current practice—that this approach is fully consistent with Section 409 of the Copyright Act, which mandates that applications for registration “shall include...in the case of a...derivative work, an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered.”⁷ The statute does not require that the applicant explicitly identify the work being registered as a derivative work, and the existing form does require the applicant to provide the information mandated by Section 409(9).⁸

We are concerned that a requirement that applicants—especially individual creators and others who may not be expert in copyright law—state whether the work being registered is a derivative work may sometimes result in the provision of inaccurate information, to the detriment of both the applicant and the integrity of the Office’s database. While in most cases it will be clear whether the work being registered is a derivative work (e.g., a painting based on a photograph, or a motion picture version of a novel), sometimes the analysis will be quite complex. *See, e.g., Ets-Hokin v. SKYY Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000) (analyzing at length whether a photograph of a vodka bottle was a derivative work of that bottle).

⁷ 17 U.S.C. §409(9).

⁸ For example, consider a book about a history of television in the 1980s, which consists primarily of text created by the author, but also includes various photographs, copyright in which is owned by third parties. When registering the work, the book’s author should be given the opportunity to exclude the photographs from her claim.

7. Simplifying Transfer Statements: Should the Office restrict the transfer statement options to “by written agreement,” “by inheritance,” and “by operation of law”?

The only options that should be available to registrants in describing a transfer of ownership are those mentioned in 17 U.S.C. §201: “by written agreement,” “by inheritance,” or “by operation of law.” There is no statutory justification for the “Other” option, which should be eliminated.

8. In-Process Corrections: Should the Office permit applicants to make in-process edits to open cases prior to the examination of the application materials?

Applicants should be able to make changes to pending applications at any point before an examiner opens the application for review. Such changes’ potential effect on the Effective Date of Registration would be governed by the practices set forth in Section 625 of the Compendium.⁹ To facilitate such an editing process, the system should permit applicants to track the progress of their applications, including the point at which the examiner opens the application for review.

9. The Rights and Permissions Field: Should the Office allow authorized users to make changes to the Rights and Permission field in a completed registration?

Authorized users should be permitted to make changes to the Rights and Permission field in a completed registration. The MPAA further supports the Office developing a user interface to simplify that process, permitting properly-authenticated users to make changes without the need for formal notices or additional fees. This would enhance the reliability of the online records and make the database more useful as a tool for facilitating licensing of copyrighted works. Given the sensitivity of this information, only the original claimant or a subsequent transferee who has completed legally sufficient copyright transfer documents and recorded them pursuant to

⁹ See Compendium (Third) 625.

Copyright Office procedures, should be permitted to make these changes. Should the Office implement such a process, we urge it to implement security and authentication processes sufficient to permit only authorized users to make changes to the rights and permissions fields.

10. Additional Data: What additional data should the Office collect on applications for registration? For example, should ISBNs or other unique identifiers be mandatory? Should the Office accept other optional data?

The electronic registration system should accommodate—but not mandate—the use of standard identifiers. While the motion picture industry does use standard identifiers (most notably the Entertainment Identifier Registry Association (“EIDR”)),¹⁰ such identifiers are used for only certain categories of works, for certain purposes (primarily marketing and distribution), and thus it would not be appropriate to require applicants to include an EIDR or other standard industry identifiers in order to register a work. Moreover, as such identifiers are often not assigned until after a work has been registered, it would not be practical to require their inclusion in an application. We would not favor a system in which the owner would have to modify its registration after the fact to supply the standard identifier details.

To the extent that standard identifiers have been consistently adopted in other industries, and those industries favor mandatory provision of such identifiers in registration applications, it may be appropriate to require those numbers to be included. Even there, however, it only makes sense to require the copyright owner to include that data if the standard identifier is assigned before an application for copyright registration is submitted.

While we do not favor a mandatory system, at least for the motion picture and television industries, we support the Office creating additional fields in the application for standard identifiers to be included on a voluntary basis and should encourage their use, where available.

¹⁰ <https://eidr.org/>

Certainly standard identifiers help users locate particular works and as such will help facilitate licensing.

Likewise, we have no objection to the Office making it possible for applicants to include a low-resolution version or excerpt of their work on a voluntary basis. This too will aid users in locating and correctly identifying individual works. However, this should only be done on a voluntary basis, as not all applicants will have the capability or interest in creating or sharing such files. Even for those applicants who wish to include a low-quality file with their registrations, the Office should take some steps to help prevent unauthorized copying of those files. The Office might require users to create an online account before being able to view or stream a file owned by another party. This would certainly not prevent all unauthorized copying, but would act as a deterrent to more casual infringers.

11. Application Programming Interfaces (“APIs”): What considerations should the Office take into account in developing APIs for the electronic registration system?

The MPAA supports the development of APIs that would allow copyright owners to complete an application by transferring data from their existing internal databases directly into the Copyright Office’s registration system. This would benefit owners and users alike, increasing efficiency while reducing data-entry errors. That said, we acknowledge that implementation would not be simple. Even among just the major motion picture studios that comprise the MPAA, each uses its own propriety database, which would need to be individually configured to communicate the relevant data to the Copyright Office. And of course the same may be true in other industries. A detailed discussion of the technical requirements of such communications will require the participation of IT experts from potential users of APIs, including the MPAA’s members, and the Copyright Office IT staff. We note that information security will be a

paramount consideration, as the MPAA members' databases contain large volumes of highly confidential, proprietary information that no third parties should be able to access. Given the magnitude of this endeavor, while we support the project, we would not support the Office prioritizing it over other more pressing modernization projects, particularly the move toward a fully electronic recordation system.

12. The Online Registration Record: Should the Office expand the Online Public Record to include refusals, closures, correspondence, and appeals?

The MPAA supports public access to copyright examination records. However, it may be the case that the Office's limited resources should be devoted to other information-access projects that would be of greater benefit to the public. While a patent or trademark's prosecution history can be critical to determining the scope of the relevant exclusive right, or whether it is valid and infringed, that is typically not the case with copyrights. Accordingly, any project to put examination records for previously-granted registrations online should not be prioritized over making more essential documents available and searchable, such as pre-1978 registrations. Of course, to the extent that simple and cost-effective changes to the Office's systems could be implemented to enable examiners to upload examination documents in the course of processing new applications, such a project could be worthwhile if it does not detract from the more essential information-access projects mentioned above.

13. Linking Registration and Recordation Records: What considerations should the Office take into account in expanding the Online Public Record to connect registration and recordation records and provide chain of title information?

The MPAA supports "seamlessly" linking registration and recordation records, for the reasons noted in the NOI. We are unclear, however, what the Office intends with the NOI's reference to "the level of detail and specificity that should be included within the chain of title."

In its comments in connection with the NPRM regarding Modernizing Copyright Recordation,¹¹ the MPAA stated that it concurred with the Office’s plan to make recorded documents available online (subject to appropriate redactions), and we continue to believe that that is the right course. Those who register copyrights or record transfers should not be required, however, to provide information beyond that which is currently required by statute or regulation; nor should the Office itself engage in chain-of-title analysis.

14. Unified Case Numbers: Should the Office issue one case number to track and identify a work or group of works through the registration and appeal process?

We strongly support the use of a single case number for a given application and registration. This number should be included on all correspondence and follow the case through any appeal. Such a practice concept would be very helpful to the MPAA’s members in tracking their large volumes of registrations and related transactions.

15. Digital First Strategy: Should the Office require only electronic and identifying material for all deposits for registration, thereby eliminating the need to submit physical deposits for purposes of registration?

The MPAA’s members are open to discussing a move toward a fully electronic process for furnishing deposits for the purpose of examination by the Copyright Office. However, any changes in this regard will require resolution of significant security issues, and a more holistic discussion about what constitutes an acceptable “Best Edition” for deposit purposes.

As the Office is aware, the MPAA’s members currently provide deposits of feature motion pictures and television episodes in a variety of formats, including physical media such as videotapes and optical discs, and (in the case of some television episodes) direct electronic transmissions. While electronic submission could be the most efficient means of providing

¹¹ MPAA Comments in Docket No. 2017-7, at 4.

deposits for registration purposes in some circumstances, a number of technical and security challenges remain.

First, because the files associated with full-length motion pictures and television shows can be extremely large, a regular upload may not be practical in the context of the current system. Second, as registrants of large volumes of works in which the Library of Congress has a keen interest, the MPAA's members do not favor a system in which they would be required to nearly always prepare and submit two versions of each deposit: a digital version for examination purposes, and then a "Best Edition" version later for the Library's purposes. Such a system would double the amount of work involved in registering their works.

Finally, as the Office is well aware, motion pictures and television programs created by the MPAA's members are among the most commercially valuable—and most frequently pirated—of all copyrighted works. Our members are very concerned with the security of digital deposit copies, particularly early in the life cycle of these works, when they are typically most commercially valuable. A prerequisite to the success of any digital deposit system—whether it be mandatory or voluntary—is implementing sufficient security measures to prevent the works from leaking online.

We propose that the Office convene a working group comprised of technology professionals from both registrants and the Office to work through the complex issues regarding digital deposits. Until such issues have been fully vetted and resolved, the MPAA will not be able to support a mandatory electronic deposit requirement.

Notably, even if the Office moves to a digital deposit system, it should still allow applicants to provide physical copies in certain circumstances. Some works, comic books for example, are only available in physical form, and it would be burdensome, expensive, and

sometimes just impractical to convert such works into electronic formats for registration purposes.

16. Digital Deposit Security

As noted above in response to Question 15, security, and the prevention of piracy, is of paramount concern to the MPAA's members, and we welcome discussions between the relevant experts at our member studios and the Office to ensure the security of deposits in all formats.

17. Other Considerations

A. Login Mechanics

The MPAA requests that, in designing the new system for online registration and recordation, the Office permit users to use the same login credentials they currently use for the eCO system. Ideally, each of the Copyright Office's systems, including the proposed new registration and recordation systems, would share a single sign-on mechanism, so that users could access all of the Office's online services without having to manage multiple user names and passwords.

B. Special Characters

Occasionally the titles of works, as well as authors and corporate owners, include special characters and symbols, such as the @ and # symbols. Currently when a special character is used in a title, it must be spelled out in regular letters (e.g., "at" or "hashtag"). As the Office designs its new online systems, it should accommodate the use of special characters in all title and name fields.

Again, the MPAA and our members thank and commend the Office for its work toward modernizing the registration and recordation systems, and appreciate this opportunity to provide

our comments 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', with a long horizontal line extending to the right.

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