



The Copyright Alliance appreciates the opportunity to submit the following comments in response to the revised draft of the *Compendium of U.S. Copyright Office Practices, Third Edition* (“Revised Draft”) released by the U.S. Copyright Office on June 1, 2017.

Prior to enacting the Revised Draft, we respectfully ask the Copyright Office to address the following concerns:

605.2 – Communicating with the U.S. Copyright Office

Section 605.2 of the Revised Draft explains that where an email address is provided in an application, it will be used as the primary means of communication with the applicant. The Copyright Office should consider allowing non-personal email addresses, such as CopyrightCounsel@XYZ.com, so that organizations can maintain a consistent means of communication with the Copyright Office despite personnel changes that may require the termination of email accounts associated with specific employees.

618.7 - Collective Works and 803.8 (F)(4) - Bonus Track Added to a Previously Published Album

Although Section 618.7 of the Revised Draft states that “an applicant may register a collective work together with the separate and independent works contained therein (i) if the copyright in the contributions and the collective work are owned by the same claimant, and (ii) if the component works have not been previously published, previously registered, and are not in the public domain” Section 312.2 states that the Office will not register a compilation unless it contains at least 4 independent works. This presents a problem, particularly in the sound recording industry, where it is not uncommon for an EP to contain 3 tracks (or 2 tracks plus artwork), which, but for the provision in Section 312.2, would qualify for this streamlined registration process for collective works. These 3 works are not merely slapped together for commercial release – there is much creative effort, thought and discussion put into the creation of such EPs, demonstrating creative authorship which some Copyright Office examiners have disputed. As a result, EPs with less than 4 works must be broken apart and the individual sound recordings registered separately, which was not the case prior to the publication of the Third Compendium. The need to register individual tracks separately not only creates a significant additional expense, but it is also burdensome because it creates a workflow problem as products cannot be registered in a manner that reflects the way they are commercially distributed. As a result, labels cannot track registrations at the EP level, and instead, must do so for each individual track, despite the fact that the work is regarded as a single commercial product.

A similar issue is presented by Section 803.8(F)(4), which discusses how to register an album that's been re-released with a bonus track. That section explains that the applicant should submit the re-released album for registration, provide the date of the first publication, and exclude the previously registered tracks. Some of our members have expressed that there are inconsistencies with how this is handled in practice. In some cases, they have been advised to register the bonus track as outlined above, and in other cases, they have been advised that it must be registered separately. When they seek to register, for example, 3 bonus tracks that have been added to a re-release, they are advised that the tracks must be registered separately and individually, whereas, when they try to register 4 or more bonus tracks that have been added to a re-release, they have been allowed to register them together as a collective work.

618.7 - (B)(2) Registering a Collective Work and a Contribution to a Collective Work

With regard to registering a collective work and a contribution to that collective work, Section 618.7(B)(2) of the Revised Draft states that “[t]he applicant may provide the titles of the contributions that were created by the author of the collective work” in the Content Titles field. However, the Content Titles section of any registration application should reflect the true and complete contents of the album being registered. This is true whether some or all of the recordings are excluded from the registration claim—as this is what the Material Excluded and New Material Included sections of the application are designed to reflect—and regardless of who authored the contributions.

As Section 610.4(A) of the Revised Draft explains, the Content Titles section is beneficial because it “provides a clear record of what the larger work contains... [and] makes these titles accessible as searchable terms in the online public record.” Requiring applicants to omit certain contributions from the Content Titles section will confuse the public record and does not accurately reflect what is actually contained in the collective work.

1107 - The Unit of Publication Option and 721.11 – User Manuals and Other Documentation

Section 1107 of the Revised Draft makes sweeping changes to the Unit of Publication Option, which permits copyright registrants to register separate works that are packaged together using a single application and one application fee. Under the Revised Draft, this option is only available for works “packaged together and distributed to the public in a physical form” to the exclusion of “works that are combined and distributed to the public in digital form.”

The rise of the internet has changed the way music is created, distributed, and consumed. In the past, independent artists faced the daunting task of developing a fan base and distributing their music on a wide scale without the aid of a record label. Today, the internet makes that task much less daunting, and gives independent artists the opportunity to succeed on their own. Just this year, for the first time in history, an independent artist won a Grammy for an album that was *only* released in digital form. For many independent musicians, digital

distribution is the only feasible option. Those independent artists need the ability to register these digital units of publication together, just as a physical CD may be registered along with its album art. Requiring that they register each element separately creates an additional and undue burden on independent artists, and will only act as a deterrent to registration.

Finally, while the Revised Draft cites to 37 C.F.R. § 202.3(b)(4)(i)(A) in support of these changes, nothing in that section of the Federal Regulations suggests a distinction between works distributed in physical form and works distributed digitally.

Section 721.11 of the Revised Draft, which deals with user manuals and other documentation for computer programs, also mirrors these changes to the Unit of Publication option. Under the Revised Draft, this section allows a computer program and the accompanying user manual or other documentation to be registered together via a single application and fee if they are “physically bundled” together, but if they are bundled together and distributed online, “each element is considered a separate work and a separate application for each element is required.” The rationale behind this change is unclear, as it only creates an additional burden for rightsholders—particularly independent software developers, who are likely to distribute their works exclusively in digital form—seeking to register their work.

1504.2 - Work Subject to the Best Edition Requirement

Section 1504.2 of the Revised Draft suggests that in certain instances, an electronic format can suffice as the best edition—for example, when the work is only released in digital format—but states that “[i]f a work was published in both a physical format and an electronic format, the applicant should submit the best edition of the work in the physical format.” In the recording industry, it is not uncommon for a work to be released *only* in digital form in the United States, but in *physical* form abroad. Under 1504.2, those claimants have the burden of needing to find these physical copies of the work from their overseas distributor (which are not always available anymore), rather than simply depositing the digital copy that is readily available to them, and that the Copyright Office would deem sufficient but for the physical release overseas. Where there is both a physical and electronic version of a work, the applicant should be permitted to select which version to submit as the deposit copy.

1509.2(B)(3) - Sound Recordings Published in Electronic Format

Section 1509.2(B)(3) of the Revised Draft states that where a sound recording is published in physical and electronic formats, the applicant must submit “the best edition of the work in the hard copy format.” This section raises the same concerns as addressed above. Claimants should be allowed to submit the select which version of the work to submit, whether that edition is in physical or electronic form.

2310.3(C) - When May a Grant Be Terminated Under Section 203?

Section 2310.3(C) of the Revised Draft adopts the view endorsed by the Second Circuit in *Baldwin v. EMI Feist Catalog*, which held that “the right of publication” as used in Section 203(a)(3) of the Copyright Act—the section that provides for the termination of grants made after 1978—means only the right of *first* publication. This view is not the better interpretation of Section 203(a)(3), and with the exception of the *Baldwin* case from the Second Circuit, this view is entirely unsupported. The Copyright Office should refrain from endorsing this view at this time.

Section 203(a)(3) provides two methods for determining when to effect termination:

1. The primary method applies to grants which *do not* cover the right of publication. Under this method “[t]ermination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant.”
2. The alternative method applies only to those grants which “cover[] the right of publication of the work.” For those grants, the period during which termination may be effected “begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.”

The legislative history of Section 203(a)(3) explains that the “alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.” H.R. REP. 94-1476, H.R. Rep. No. 1476, 94TH Cong., 2ND Sess. (1976), at 126.

Section 203(a)(3) closely resembles the text of H.R. 4347 introduced in the 89th Congress in 1965. The relevant section—Section 203(a)(2)—of that bill read:

“Termination of the grant may be effected at any time during a period of five years beginning at the end of 35 years from the date of execution of the grant; or, if the grant covers the right of *first publication* of the work, the period begins at the end of 35 years from the date of *first publication* of the work or at the end of 40 years from the date of execution of the grant, whichever term ends earlier.” (emphasis added)

During a hearing on that bill in 1965, before the House Judiciary Committee, publishers—including the American Book Publishers Council, Inc., the American Guild of Authors & Composers, the American Society of Composers, Authors and Publishers (ASCAP), the American Textbook Publishers Institute, The Authors League of America, Inc., the Composers and Lyricists Guild of America, Inc., and the Music Publishers Association of the United States—requested that the word “first” be deleted, and that “under such grant” be added after “work.” The publishers explained that the reason for this request was “to make clear that the period during which termination of a grant under a copyright may be effected is intended to begin at the end of 35 years after publication *under the grant which is sought to be terminated* and not after

publication under some other grant; for instance, if the grant is to a book publisher the publication intended is that of that publisher's edition of the book and not of any prior publication by some other publisher." *Copyright Law Revision: Hearings on H.R. 4347 et al. Before Subcomm. No. 3 of the House Judiciary Comm., 89th Cong., 1st Sess. 140-41 (1965)* (emphasis in original).

Following these hearings, the revised bill contained language identical to the current section 203(a)(3), which omits the word "first" and includes "under the grant." H.R. 2512, S. 597, 90th Cong., 1st Sess. (1967). The *Baldwin* decision effectively reads into Section 203(a)(3) the reference to "first publication" that Congress specifically struck from the predecessor bill. The principal basis the court cited for reaching that result is that Section 203(a)(3) refers to a singular "date of publication," which the court thought suggested that publication is a one-time event. 805 F.3d at 33. However, that explanation ignores the words "under the grant," which were added at the same time and explain the use of the singular.

The rationale for measuring the 35-year termination period from public distribution under the relevant grant, rather than from the date of execution of the grant, generally applies to second grants as well as initial grants. While some version of the work exists at the time of a second grant, a new publisher is unlikely to begin distributing the work under a second grant the day the second grant is executed. Instead, there will usually be a period of preparing the work for distribution by the new publisher that is analogous to the period of delay before first publication. Such a delay may be of material duration if plans involve creating a new edition of the work or some other major re-release activity. It appears to have been Congress' intent to delay the running of the 35-year termination period until the relevant publisher has had an opportunity to get the work into distribution, whether in the context of an initial release or a re-release.

As the Compendium states "courts may consider the interpretations set forth in administrative manuals, policy statements, and similar materials," including the Compendium. Because the *Baldwin* decision adopts a questionable interpretation of Section 203(a)(3), at minimum, it is premature for the Copyright Office to adopt the view held by the Second Circuit on this issue.

Respectfully submitted,

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