



**BEFORE THE
U.S. COPYRIGHT OFFICE**

Group Registration of Updates to a News Website
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Docket No. 2023–8

COMMENTS OF THE COPYRIGHT ALLIANCE

The Copyright Alliance appreciates the opportunity to submit the following comments in response to the [notice of proposed rulemaking](#) (“NPRM”) published by the U.S. Copyright Office in the Federal Register on January 3, 2024, regarding the creation of a new group registration option for frequently updated news websites.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization representing the copyright interests of over 2 million individual creators and over 15,000 organizations in the United States, across the spectrum of copyright disciplines. The Copyright Alliance is dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The individual creators and organizations that we represent rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of copyrighted works for the public to enjoy. This includes creators and organizations such as reporters, journalists, writers, editors, photographers, newspaper publishers, and other members of the press community who rely on copyright and the benefits of copyright registration to protect their creative journalistic works.

We would like to open our comments by thanking the Copyright Office for drafting, publishing, and soliciting input on this proposed new rule, which will enable news publishers to effectively register updates to their online news websites. It is our hope that this proposed rule can go into effect as soon as possible since, at present, it is impractical and prohibitively costly under current registration options for most news publishers to register their ever-changing, dynamic websites and the news works as contained therein. As the Office recognizes in the NPRM, news publishers throughout the country are in dire need of an immediate and effective solution that resolves the various registration obstacles they face, and this rule does a terrific job addressing those obstacles within the current IT constraints. While the proposed rule is good and very necessary, there is still room for improvement, as we detail further in our comments below. However, we urge the Office not to make perfect the enemy of the good and implore the Office not to delay implementation of the rule. If improvements to the rule would delay the implementation of it, we are supportive of an approach similar to the approach the Office has taken with other proposed rules (like the recent CCB “smaller claims” rules), whereby it enacts a final rule that takes into account changes that can be immediately and easily implemented and then afterwards, makes any necessary additional more long-term or difficult changes while the rule is in effect.

This new rule also represents an important step in the copyright registration modernization process. We appreciate the Office’s willingness to propose and implement this new rule now—instead of waiting for the new copyright registration system to launch in a year or two. We understand that, because the proposed new rule would be implemented using the existing registration system, there are certain technological and procedural restraints that must be imposed that otherwise might not be necessary if the rule were to be implemented under the new registration system. If changes to this rule cannot be made at this time because of such restraints, we are hopeful that the Office will take these concerns into account when developing and implementing its new copyright registration system. This way, when the new registration system is implemented, there will be an opportunity to reassess and easily modernize this rule (and many other features of the registration system) with changes that will increase the efficiency and effectiveness of the operations of the copyright registration system and expand access to the creative community.

For example, (as discussed more below) when the new registration system becomes effective it will be necessary to broaden this rule and the registration system's capabilities to handle additional dynamic formats including mobile applications ("apps"). For the time-being though we understand why the Office may have limited the rule to updates of news websites and have no objection to that approach as to not further delay implementation (assuming there is an administrative reason for the proposed limit).

As the NPRM notes, the need for a flexible registration option for news websites has been long overdue as copyrightable news content is overwhelmingly consumed and disseminated in digital form, and much content never appears in a print edition. The traditional registration system—which was created for physical formats of newspapers—has not been able to meet the demands arising from the changes in the ways that copyrightable news content is delivered and consumed. It is therefore necessary to ensure that the proposed registration option be flexible enough to accommodate the dynamic nature of digital news content and to allow publishers to enforce their copyrights for works which could not be easily registered under existing registration options.

We again applaud the Copyright Office for taking this important step toward modernizing the copyright registration system to align with the new business and practical realities of newspaper publishers and their readers and to encourage participation in the copyright registration system. Overall, the current proposed rule is appropriately modeled off the preexisting rules for group registration of newspapers while balancing the needs of news and media publishers and other stakeholders. This new rule will finally enable news and media publishers to meaningfully enjoy the benefits arising from copyright registration for digital news content, including being able to file a lawsuit in federal court and, when appropriate, to recover statutory damages for editions as a collective work and, when they establish an independent economic value and ownership of the individual articles within the collective work, the articles as well.

We provide comments and suggestions below on areas in the proposed rule that are ripe for recalibration in order to be responsive to news publishers' needs, and to reply to the Copyright

Office’s discussion of several related issues in the NPRM, including the subjects of inquiry raised by the Office.

I. Definition of “News Website”

We understand that the definition of “news website” in the proposed rule mirrors the current definition of a newspaper in the current rule for the group registration of newspapers.¹ However, we encourage the Office to broaden the definition in this proposed rule given the new ways that copyrightable news content is being disseminated and consumed in the digital context.

The definition in the proposed rule provides that “a news website is a website designed to be a primary source of written information on current events that is local, national, or international in scope, and which contains a broad range of news on all subject and activities and is not limited to any specific subject matter.”² We urge deletion of the phrase “. . . on all subjects and activities and is not limited to any specific subject matter” in the proposed rule in §202.4(m)(1)(i) so that the definition in the final rule would read:

“(m) *Group registration of updates to a news website . . .*

(1) *Definitions.* For the purposes of paragraph (m) of this section: (i) *News website* means a website that is designed to be a primary source of written information on current events, either local, national, or international in scope, that contains a broad range of news.”

We assume that the definition does not intend to exclude news websites which cover specific topics and see no reason why this new group registration option would be limited to only those news websites that cover all the news. It is not entirely clear whether this definition would be unnecessarily limiting in light of the popularity of consuming specialized and subject matter

¹ 37 C.F.R. § 202.4(e) (2021).

² Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 317 (Jan. 3, 2024) (to be codified at 37 C.F.R. pt. 201).

specific news content in the digital age. We assume that this definition would not be used to exclude news websites that are focused on a specific subject matter like food, sports, entertainment, or finances, but may cover different topics within that subject matter. There is no reasonable justification given in the NPRM for such a limitation, other than explaining that the definition of digital news websites is modeled off the definition of analog newspapers. News publications in physical formats may have been more apt to cover a variety of subjects and topics in the past because news articles were gathered into one physical newspaper. Digital news on the other hand, due to its ability to reach readers across different localities who share similar interests, can be more tailored toward particular topics of interest as readers are often looking to read individual news articles on specific topics or issues. It would be better to delete the aforementioned portion of the definition to provide clarity that the final rule does not unnecessarily restrict or leave out certain news publishers from benefitting from this new group registration option.

To be clear, the suggested change for the proposed rule should not disrupt news publishers' abilities in continuing to register their traditional news content under the current group registration option. We understand that, in the past, the definition of newspaper in that rule had been accepted by news publishers and had never been interpreted by the Copyright Office's Registration department in a way that would restrict news publishers' ability to register newspapers that cover specific subject matters (like food, sports, entertainment, or finances). However, our concerns with a similar limiting phrase existing in the proposed rule arises from the more singular and individualized way digital news content is delivered by and read from digital news websites, as opposed to the more generalized way news content was delivered by and read from traditional physical newspapers. If the Office decides not to alter the definition of "news website" in the proposed rule, at the very least, as an alternative, we urge the Office to make clear in its notice announcing the final rule, that, similar to the definition of "newspapers," the definition of "news website" will also be interpreted very broadly (as it has been done in the past) so as not to limit the new rule's applicability to news websites containing news content of a specific subject matter.

Secondly, we recommend the rule be amended to include apps in the definition in proposed §202.4(m)(1)(ii). As we all know, readers have been consuming news content via apps, and news publishers have been delivering much of their news stories in this format—either directly or through licensed news aggregators. Unless there is an unworkable technical limitation that prevents the Office from receiving deposit copies of apps, we suggest that the final rule also allow the submission of deposit copies of apps. It is no more difficult to provide a deposit copy in Portable Document Format (PDF) form for an app than it is for a website. (In fact, it may actually be easier). Although an app may not have a URL, news content on an app is already organized and contained in an interconnected and uniform ecosystem, much like a website. In spite of the URL difference, providing PDF deposit copies of the app would address any record-keeping concerns and concerns over whether the collective works stem from the same source.

We therefore suggest that the Office include apps in the definition of news website to render it possible for news publishers to register updates in both website and app formats. In the event that there is some technological barrier preventing news publishers from registering their works in an app format, we strongly urge the Office to (i) ensure that that barrier is resolved for the new copyright registration system, and (ii) ensure that, as soon as possible following implementation of the new registration system, a new definition becomes effective that would allow registration of group news updates in app format (in addition to website format).

II. Subjects of Inquiries: Provision of Additional Information

The Office presents two subjects of inquiry in the NPRM. The first asks whether the Office should give applicants an opportunity to provide information about individual works in each of the collective works included in the group registration and the impact this would have on news publishers. So long as the provision of information remains voluntary, there should be no negative impact to news publishers arising from the Office *allowing* for the provision of additional information about particular articles within the collective work.

It is essential that any provision of additional information about particular articles comprising the collective work be voluntary and that failure to provide such information must never be required,

treated as a bar to registration, or used in any manner that could undermine the registration or the benefits that inure to the registrant, such as the presumption of validity which inheres in the registered works. If the provision of this additional information is not voluntary and/or is allowed to be used to undermine registration benefits, this will create an unnecessary barrier to registration and would result in fewer registrations, and thus, less information for the public and fewer deposit copies for the Library of Congress' collections. As extensive newspaper collections have traditionally been a critical part of the Library's archival and collection efforts, it behooves the Office to incentivize news publishers to register their news content.

The second subject of inquiry asks about (i) the availability and effectiveness of technological solutions for saving and archiving websites and (ii) whether publishers should be permitted to provide additional information (such as archived URLs that capture the content of each collective work in the registration) in a "Note to the Office" field within the registration application. As for the first part of this inquiry, various news publishers already employ various technological solutions to save and archive their news websites to assist their recordkeeping efforts. We defer to them to identify those solutions and methods. With regard to the second portion of this inquiry, similar to our response to the first subject of inquiry above, providing such additional information in the application, such as archived URLs, must remain voluntary and never be treated as a registration requirement or as a factor that could be used to undermine statutory benefits arising from registration.

III. Statutory Damages

In the NPRM, the Copyright Office discusses the ability to obtain statutory damage awards for infringements of collective works registered through a group registration and individual articles contained in such works. The Office cites 17 U.S.C. §504(c)(1), which provides: "For the purposes of this subsection [regarding statutory damages], all the parts of a compilation or derivative work constitute one work." However, when discussing the possibility for statutory damages awards for infringements of individual works covered by the same compilation registration, the NPRM provides an incomplete, and therefore inaccurate, statement of the law

and how courts have interpreted and applied this provision.³ This is an error that could have profound impact upon our members and we respectfully request that it be redressed by the Office in its final rulemaking on this NPRM and/or in any corresponding Copyright Office materials including its Circulars and the Compendium.

The fact that an individual work is registered as part of a compilation or a collective work rather than being registered on a per-work, individual basis, should have no impact on the way in which statutory awards are granted for that individual work. Though §504(c)(1) provides that all parts of a compilation constitute one work, *it does not define what a “work” is and does not say that individual works in a compilation cannot also exist as separate, independent works*. Plainly, individual news articles, photographs, and other constituent, underlying works are copyrightable as individual “works” of authorship, even though those works may be registered together.⁴ Inclusion of a particular work in a collection, compilation, group registration or database does not rob the work of any of its protections, including the right to recover statutory damages for the infringement of that work. Multiple courts have held that §504(c)(1) does not limit statutory damages for individual works that are a part of a compilation when the individual work within the compilation is made available in the marketplace in a manner that has an economic value independent of the value of the compilation.⁵

³ Group Registration of Updates to a News Website, 89 Fed. Reg. 311, 314 (Jan. 3, 2024) (to be codified at 37 C.F.R. pt. 201).

⁴ See *New York Times Co. v. Tasini*, 533 U.S. 483 (2001). Here, the Supreme Court held that the Copyright Act recognizes that copyright inheres both in the individual works that make up a collective work *and* in the copyright in the collective work as a whole. However, copyright in the collective work does not extend to the preexisting material. The Court stressed that the clear purpose of the 1976 revision of the Copyright Act was to ensure that while the selection and placement of images and articles in a collective work such as a magazine, newspaper, or database, is a copyrightable collection, the individual works in the collection have independent protectable value.

⁵ See, e.g., *VHT, Inc. v. Zillow Group, Inc.*, 69 F.4th at 988 (9th Cir. 2023) (stating that “the number of copyright registrations is not the unit of reference for determining the number of awards of statutory damages” and noting that “the independent economic value of the photos ‘informs our analysis’” of whether statutory damages may be awarded for individual works.); *Sullivan v. Flora, Inc.*, 936 F.3d 562, 572 (7th Cir. 2019) (holding that the copyright owner of 33 individual illustrations registered as two collective works could obtain statutory damages for each infringed individual illustration, stating, “[t]he inquiry and fact finding demanded by § 504(c)(1) is more functional than formal, taking account of the economic value, if any, of a protected work more than the fact that the protection came about by an artist registering multiple works in a single application”); *Gamma Audio & Video, Inc. v. Ean-*

In the digital age, news content is often consumed on an individual article basis—which is quite different than it had been in the past. Today, news consumers tend to get individual news stories targeted to their interests from news websites and/or news aggregators. Just like music consumption has changed from album sales to streaming of individual recordings, news consumption has moved from newspaper sales to consumption of individual news stories. And just like the individual recording, the individual article also has its own independent economic value separate and apart from the album or the newspaper in which they appear or with which they were registered. To suggest that, under §504(c)(1), statutory damages may be recovered for a compilation or collective work without also acknowledging the independent economic value test for the underlying individual, component works is to only tell half a story.

This has serious implications for our membership, which is comprised of a spectrum of creators and copyright owners, including musicians, record labels, photographers, software and database companies and many others, whose businesses and ability to enforce and enjoy their copyrights wholly depend on the registration options that allow them to register their songs, photographs, literary texts, and other creativities as compilations, collections, databases, and in groups. The Office’s incomplete statement about statutory damage awards has the potential to disincentivize these creators and copyright owners from registering their works with the Office.

Accordingly, we urge the Copyright Office to clearly acknowledge the “independent economic value test” in the discussion section of a final rule. Additionally, other Copyright Office materials

Chea, 11 F.3d 1106, 1116-17, n.8 (1st Cir. 1993) (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990)) (adopting the “independent economic value” test to determine that each episode of series had copyright value unto itself and was therefore an independent work for purposes of awarding statutory damages); *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 101 (2d Cir. 2016) (affirming district court’s award of statutory damages of music singles that were part of an album); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 769-70 (11th Cir. 1996) (affirming the district court grant of statutory damages for the infringement of individual episodes in a television series because each episode was a separate, standalone “work” apart from the series); *see also Nihon Keizai Shimbun v. Comline Bus. Data*, 166 F.3d 65, 74 (2d Cir. 1999) (recognizing statutory damages awards for infringements of individual articles of registered newspapers).

should be updated accordingly, including the Compendium and relevant Circulars,⁶ to make clear that courts have recognized the economic value in individual works apart from their compilation when determining and awarding statutory damages.

IV. Deposit Copies

We want to thank the Copyright Office and express our strong support for its flexible approach in the proposed rule relating to deposit copies. The deposit copy issue has long been a difficult one for newspaper publishers and the Office (as well as other Copyright Alliance members). We also understand that there are technological and practical limitations and considerations for the Library of Congress as well when processing massive volumes of frequent digital works,⁷ and the proposed rule appropriately recognizes that the reasonable and practical solution is to accept identifying materials as allowed by the law.⁸ The proposed rule solves both the problems of the news publishers and the Library in a masterful and balanced way by allowing for the provision of identifying material which demonstrates that the home page contains sufficient selection, coordination, and arrangement authorship to be registered as a collective work.

This rule should be fine-tuned by the Office to ensure that the language of the proposed rule in §202.4(m)(6) permits news publishers to submit identifying material where it is not technologically possible to submit a “complete copy” of the home page of the website. For example, many news websites employ an “infinite scroll” method in their homepage where a user is able to continuously reveal additional content on the webpage without having to leave the

⁶ Discussions that can be updated in the Compendium which allude to similar conclusions about §504(c)(1) includes but is not limited to, *see e.g.*, U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §1008.4 (3d ed. 2021); U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES ch. 1100 (3d ed. 2021); U.S. COPYRIGHT OFFICE, MULTIPLE WORKS (CIRCULAR 34) (2021).

⁷ *See* Letter from Shira Perlmutter, Register of Copyrights, U.S. Copyright Office, to Sen. Thom Tillis, Ranking Member, S. Comm. on the Judiciary, Subcomm. on Intell. Prop. at 8 (Dec. 1, 2022), <https://www.copyright.gov/policy/best-edition/usco-best-edition-study-letter-12012022.pdf> (recognizing that the Library’s system is limited and it is continuing to modernize its infrastructure as the reason why the registration system cannot accommodate more flexible best edition requirements).

⁸ 17 U.S.C. § 408(c)(1).

page to view the content on a separate webpage. For such webpages, it is not possible to capture an “entire copy” of the page since the user can endlessly reveal the contents of the page. The proposed rule should be amended to allow the PDF files of just “a copy” of the home page of the website, since subsection (ii) of the proposed rule requires the demonstration of copyrightable authorship in the identifying material. This should be sufficient for registration purposes as it enables the Copyright Office to determine the scope of copyright of the collective work in its examination process while remaining flexible to accommodate technological limitations imposed by features like infinite scrolling.

Conclusion

We again applaud the Copyright Office for taking this important step forward in modernizing its registration system by instituting a much-needed, flexible registration system that is responsive to the needs of news publishers, and stress that the rule should be implemented immediately, and if necessary, as an interim rule that will allow the Office to fine-tune its implementation based on empirical experience. To the extent the Office is able to do so while accommodating changes, we reiterate our suggestions and concerns regarding this rulemaking, specifically that the Copyright Office:

- delete the phrase in the final rule in §202.4(m)(1)(i) “. . . on all subjects and activities and is not limited to any specific subject matter”;
- include mobile applications in this group registration option;
- include discussion in the rulemaking and update the Compendium and other Copyright Office materials to acknowledge the independent economic value of individual works in compilation, collective, and group registrations when awarding statutory damages; and
- permit flexible deposit requirements in the final rule to allow news publishers to submit “copies” of webpages to accommodate technical limitations arising from various website characteristics, like infinite scroll.

We look forward to continuing to provide the perspectives of creators and copyright owners on this and other registration related rulemakings to assist the Copyright Office in its ability to

encourage and incentivize robust participation in the copyright registration system. Please feel free to contact us if you have any questions about these comments.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'KK', with a long horizontal flourish extending to the right.

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