



## LIBRARY OF CONGRESS

### U.S. Copyright Office

[Docket No. 2017-14]

#### Compendium of U.S. Copyright Office Practices

**AGENCY:** U.S. Copyright Office, Library of Congress.

**ACTION:** Update to Compendium of U.S. Copyright Office Practices, Third Edition.

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**SUMMARY:** The U.S. Copyright Office is announcing the release of an update to its administrative manual, the *Compendium of U.S. Copyright Office Practices, Third Edition*, which goes into effect as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**DATES:** The final updated version of the *Compendium of U.S. Copyright Office Practices, Third Edition* is available on the Office's website as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Erik Bertin, Deputy Director for Registration Policy and Practice, Sarang Damle, General Counsel and Associate Register of Copyrights, Regan A. Smith, Deputy General Counsel, or Catherine Zaller Rowland, Senior Advisor to the Register of Copyrights, all by telephone at (202) 707-8350.

**SUPPLEMENTARY INFORMATION:** The *Compendium of U.S. Copyright Office Practices, Third Edition* (“*Compendium*”) is the administrative manual of the U.S. Copyright Office. It “explains many of the practices and procedures concerning the Office’s mandate and statutory duties under title 17 of the United States Code.” 37 CFR 201.2(b)(7). “It is both a technical manual for the Copyright Office’s staff, as well as a guidebook for authors, copyright licensees, practitioners, scholars, the courts, and members of the general public.” *Id.* While it has been a guiding manual for the Copyright Office for several decades, the Office conducted a comprehensive revision of the entire *Compendium* beginning in 2011, which was completed in December 2014 and resulted in the Third Edition. 79 FR 78911 (Dec. 31, 2014).

To ensure that the *Compendium* remains up to date, the Office monitors the law and Office practices. After conducting this analysis with regard to the 2014 version, the Office released a draft revision to the *Compendium* on June 1, 2017 (the “Public Draft”). The Office posted the Public Draft on its public website and invited comments until July 30, 2017. The draft included proposed revisions to the registration chapters that clarified, among other things: how and when the Office communicates with applicants; and how it handles duplicate claims, deposit requirements, and claims involving multiple works. The Public Draft also sought to provide preliminary guidance for claims involving useful articles based on the Supreme Court’s recent decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017). Revisions to the recordation chapter provided additional guidance for recording notices of termination, as well as information on the Office’s new electronic system for designating agents for online service providers. 81 FR 75695 (Nov. 1, 2016). The Public Draft also explained recent regulatory changes that impact post-registration procedures, including the new “mailbox rule” for calculating dates in requests for reconsideration and new procedures for removing personally identifiable information. 81 FR 62373 (Sept. 9, 2016); 82 FR 9004 (Feb. 2, 2017). The update also incorporated changes made by the recent technical amendments to the Office’s regulations. 82 FR 12180 (Mar. 1, 2017). An archived copy of the Public Draft is available on the Office’s website.

The Office received comments on the Public Draft from the Copyright Alliance, the Intellectual Property Owners Association (“IPO”), the Kernochan Center for Law, Media, and the Arts at Columbia Law School, as well as four individuals. After carefully reviewing these comments, the Office decided to further revise twenty-one sections of the Public Draft, resulting in a final update (the “Final Version”), as discussed in more detail below. Additionally, the Final Version reflects rulemaking activity that post-dated the Public Draft, including the Office’s final rules on supplementary registration and group registration for contributions to periodicals. 82 FR

27424 (June 15, 2017); 82 FR 29410 (June 29, 2017).<sup>1</sup> It includes a revised Chapter 1700 that reflects the Office's new practice for amending a claim during the course of a request for reconsideration. In addition, the Office will not adopt the position in the Public Draft that, when an application deposit consists of only one copy when two are required, the effective date of registration would be based on the date the second copy was received. This would have been a departure from the Office's current practice, and the Office has decided to maintain its current practice (described in Chapters 600 and 1500 of the 2014 version). A complete list of all sections that have been added, amended, revised, or removed is available on the Office's website at <https://www.copyright.gov/comp3/revisions.html>, along with redlines that provide a direct comparison between the Final Version and the 2014 version of the *Compendium*.

Revisions to the Public Draft reflected in the Final Version are as follows:

*Applicability of the 2017 Update to the Compendium*

In response to a suggestion from IPO, the Office amended the Introduction to confirm that applications and documents registered or recorded on or after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], will be governed by the Final Version. The Introduction also confirms that registrations and recordations that are issued by the Office before that date will generally be governed by the 2014 version of the *Compendium*, except in cases where that version had been superseded by an amendment to the regulations, intervening case law, or previously announced changes in practice.

*Email Communication with the Office*

If an applicant provides an email address in the application, the Office will use that address as the primary means for communicating with the applicant, even if the applicant also provides a telephone number or other contact information. As the Copyright Alliance noted,

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<sup>1</sup> The Final Version does not include the Office's recent interim rule on secure tests, because the deadline for submitting comments in that proceeding does not expire until December 11, 2017. 82 FR 26850 (June 12, 2017).

applicants do not need to provide a personal email address or designate a specific person to receive emails from the Office. The Office will accept communications from a general email address that may be used by multiple people within the same organization, such as “copyrightadministrator@publisher.com.” See Final Version, section 605.2.

*Best Edition Requirement*

Sections 1504.2 and 1509.2(B)(3) of the Final Version clarify that an applicant may submit a digital copy of a work if it was published solely in a digital form in the United States—even if that work was published in another country in a physical form. This responds to the Copyright Alliance’s concern that it may be too burdensome to obtain physical copies from an overseas distributor, especially if a digital copy is readily available in this country.

*Disclaiming Preexisting Material*

When an applicant submits a work that contains previously published material, the applicant is generally expected to exclude that material from the claim.<sup>2</sup> The Public Draft summarized the legal and policy justifications for this longstanding practice. It also explained that this practice applies regardless of whether the previously published material was authored by the copyright claimant or a third party. See Public Draft sections 503.5, 507.2.

IPO contended that these revisions are inconsistent with the weight of legal authority holding that a registration for a derivative work may be used to enforce the copyright in a preexisting version of the same work, even if the preexisting version has been previously published and has not been separately registered with the Office. IPO also contended that the revisions to these sections will increase the complexity of registering and enforcing the copyright

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<sup>2</sup> In particular, applicants should add a disclaimer if the work contains an “appreciable” amount of previously published material. This requirement was stated throughout the 2014 version of the *Compendium*. See, e.g., *Compendium*, sections 311.2, 507.2, 508.2, 618.2, 618.5, 618.6, 618.7, 621, 621.1—621.9 (3d ed. 2014). But in a few places the Office inadvertently used the word “substantial” in place of the word “appreciable.” See *id.* sections 712.3, 715.3, 717, 717.2, 718, 721.9(G), 727.3(D). The Public Draft corrected these oversights, and contrary to IPO’s suggestion, these corrections do not represent a change in the Office’s current policy.

in derivative computer programs, and will discourage software companies from registering their works.

After considering the IPO's comments, the Office agrees that this issue warrants further study. Therefore, the changes proposed in sections 503.5 and 507.2 of the Public Draft will not be adopted at this time. The Office also removed the phrase "the version that is being registered" from sections 1509.1(C)(2) and 1509.1(C)(4)(b) of the Public Draft.<sup>3</sup>

The Office intends to revisit this issue in the future through a formal notice of inquiry. Until the Office has concluded that public process, the Office will maintain its current practices for examining these types of claims. In the meantime, applicants should continue to add a disclaimer if a work contains an appreciable amount of previously published material, and if applicants do not exclude this type of material, the Office will continue to communicate when an appropriate disclaimer is needed.

#### *Computer Programs*

IPO expressed concern that a change made in the Public Draft would require applicants to expressly claim "non-executing comments" in the application in order to register that aspect of a work. *See* Public Draft sections 721.7, 721.9(F). IPO stated that software developers consider non-executing comments to be an integral part of a computer program.

The Final Version confirms that the term "computer program" may be used to assert a claim in both the executable code and non-executing comments within a computer program. It also confirms that applicants may register both elements by checking the box marked "computer program," or by checking that box and expressly stating "non-executing comments" in the

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<sup>3</sup> The language appearing in the corresponding sections of the 2014 version will be retained for the time being. But to be clear, the Office retained some minor changes made in these sections, such as those discussed in footnote 2, and changes in section 721.8 that do not involve the prior-publication issue.

application.<sup>4</sup> See Final Version sections 618.4(C), 721.7, 721.9(F).

IPO also expressed concern that the Office may cancel a registration if “a court determines that an applicant submitted redacted source code or object code that does not contain trade secret material.” Public Draft, section 1509.1(C)(4)(b). The regulations state that an applicant may only submit redacted source code or object code if the program contains trade secret material. See 37 CFR 202.20(c)(2)(vii)(A), (B). The regulations also state that the Office may cancel a registration if it “becomes aware that . . . [the] correct deposit material has not been deposited.” 37 CFR 201.7(c)(4). However, the Final Version confirms that before doing so, the Office will ask the claimant to resubmit an appropriate deposit. It also clarifies that the Office will cancel a registration only if the Office does not receive a response within 30 days, or if the claimant’s response does not resolve the problem.<sup>5</sup> See Final Version section 1509.1(C)(4)(b).

#### *Choreographic Works and Pantomimes*

In response to comments submitted by the Kernochan Center,<sup>6</sup> the Office removed “competitive ice skating,” “synchronized swimming,” “parades,” “marching band routines,” “magic acts,” “circus acts,” and “juggling” from the examples of physical activities that cannot be registered as a pantomime or a choreographic work. If the Office receives claims involving these types of activities in the future, they will be evaluated on a case-by-case basis. See Final Version sections 805.5(B)(3), 806.5(B)(5).<sup>7</sup>

#### *Notices of Termination Under Section 203 of the Copyright Act*

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<sup>4</sup> At IPO’s suggestion, the Final Version discourages applicants from using the term “text” to describe non-executing comments, because that term is potentially ambiguous.

<sup>5</sup> At IPO’s suggestion, the Office retained language from the 2014 version of the *Compendium* stating that “[t]he applicant *should not* block out any portions of the source code that do not contain trade secret material.” Final Version section 1509.1(C)(4)(b) (emphasis added).

<sup>6</sup> At the Kernochan Center’s suggestion, the Office also revised one of the examples in section 906.4 of the Public Draft to clarify that calligraphy is a stylized typeface and that typeface is not copyrightable.

<sup>7</sup> The Office also removed some of the other activities listed in these sections, such as runway modeling and wrestling matches. The Kernochan Center did not mention these activities in its comments. The Office decided to remove them for stylistic reasons and to streamline the discussion of these issues.

Section 203(a)(3) of the Copyright Act provides that, if a grant “covers the right of publication of the work,” the period for terminating that grant “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.” 17 U.S.C. 203(a)(3). The 2014 version of the *Compendium* took the position that the “date of publication” is the date the work is published “under the grant,” and acknowledged that the date of publication under a particular grant may or may not be the date the work was published for the first time. *See Compendium* sections 2310.3(C), 2310.3(C)(2) (3d ed. 2014).

The Public Draft amended these sections to reflect the approach adopted by a Second Circuit case, *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 33 (2d Cir. 2015). Specifically, the draft stated that the phrase “date of publication” means the date the work was published for the first time. *See* Public Draft sections 2310.3(C), 2310.3(C)(1), 2310.3(C)(2), 2310.3(D)(1), 2310.3(D)(1)(a). The Copyright Alliance contended that this interpretation is not supported by the statute or the legislative history, and urged the Office to retain the corresponding language from the 2014 version of the *Compendium*.

After further consideration, the Office agrees that the 2014 version represents the better reading of section 203(a)(3), and is not prepared to follow *Baldwin* in light of the limited jurisprudence on this matter. This reading is supported by both the language and structure of the statute. The terms “first published” and “first publication” are used in multiple sections of the Copyright Act, including sections 101, 104, 104A, 302, 401, 402, 406, 408, 409, 410, and 412. Presumably, Congress would have used the same terminology in section 203(a)(3) if that provision only applied to grants that convey the right to publish a work for the first time.

Indeed, the termination provision in an early copyright reform bill did provide that “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.” H.R. 4347, 89th Cong. (1965). But the word “first” was dropped from subsequent bills, *see* H.R. 2512, 91st Cong. (1967), and it is that version of the

provision that was eventually enacted as part of the Copyright Act of 1976. The legislative history shows that this change was intentional. The relevant House Report explains that the provision was specifically amended so that the provision would “apply to any publication contract, and not just to contracts involving first publication.” H.R. REP. NO. 89-2237, at 122 (1966); *see also* H.R. REP. NO. 90-83, at 93 (1967). Accordingly, the Final Version reverts to the Office’s initial interpretation reflected in the 2014 version of the *Compendium*, with an additional discussion of this issue, as this interpretation is most consistent with the terms of the Copyright Act.

#### Section 115 Compulsory License

One individual expressed concern that the Public Draft suggested that copyright owners must register their works as a condition for receiving royalties under the compulsory license set forth in section 115(c)(1) of the Copyright Act. The Final Version confirms that copyright owners may be entitled to receive royalties under this section if they are identified “in the registration or other public records of the Copyright Office.” *See* Final Version section 202 (quoting 17 U.S.C. 115(c)(1)).

#### Unit of Publication

The 2014 version of the *Compendium* states that multiple works may be registered as a unit of publication if they are physically packaged or bundled together and distributed to the public in that form. It also contains a single sentence suggesting that a “digital download” could be considered a unit of publication. *See Compendium*, section 1107.1 (3d ed. 2014). The Public Draft removed this sentence because it is inconsistent with other provisions in the *Compendium* that clearly and repeatedly state that the unit of publication option may only be used to register works fixed and distributed in a physical format. The revision to the sentence in section 1107.1 does not represent a change in policy from the 2014 version of the *Compendium*; it simply corrects a minor inconsistency in that version.

The Copyright Alliance and one individual asked the Office to expand the unit of publication definition to allow applicants to register separate works that are packaged and

distributed in a digital form. The Office declines to adopt this suggestion. The unit of publication option was always intended to be a narrow accommodation to account for a particular scenario: where a physical product bundles together multiple types of works of authorship as a single “unit,” and those separate works are not published individually. The paradigmatic example is a board game with playing pieces, a game board, and instructions; each of those components may be a separate work of authorship—the playing pieces may be individual sculptural works, the game board may be a pictorial or graphic work, and the instructions may be a literary work. But it would make little sense—and would be administratively burdensome on the Office—to impose the general requirement of separate applications for each work of authorship in these cases. Among other things, imposition of that rule would result in deposits that are either duplicative (*e.g.*, the applicant sends the entire board game with each application) or incomplete (*e.g.*, the applicant sends each element of the board game separately).

In the Office’s view, the same concerns are not present with respect to digital products. To begin with, the problem with duplication of deposits is significantly diminished with respect to digital works. Moreover, while it may be relatively easy for applicants and the Copyright Office to assess whether a physical product qualifies as true “unit of publication,” the same cannot readily be said for digital products, which could be distributed in a single digital file or in multiple digital files, or could readily be published only as a bundle, or both in a bundle and individually. Thus, at least at this time, the Office believes that it is inappropriate to extend the unit of publication option to digital products.<sup>8</sup>

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<sup>8</sup> Another individual asked the Office to clarify that works fixed in the same medium of expression may be considered a unit of publication. The Office did not accept this suggestion. As a general rule, an applicant should prepare a separate application, filing fee, and deposit for each work that is submitted for registration. The unit of publication option is a narrow and limited exception to this rule. It provides a means for registering multiple works with one submission in cases where multiple submissions would otherwise be required and where no other statutory or regulatory accommodation exists. Often, when multiple items are fixed in the same medium of expression, they may be considered a derivative work, a compilation, or a collective work. If so, there is no need to rely on the unit of publication option, because the statute already provides a

That said, the Office has, over time, expanded its group registration options to accommodate the need to register multiple works with the same application. To the extent the concern expressed in the comments relates to the inability to register multiple musical works fixed and/or distributed on an album, the Office is planning to create a new group registration option to accommodate those situations.

*Collective Works and Contributions to Collective Works*

The Copyright Alliance commented on the Public Draft's discussion of collective works. First, it asserted that more information should be included in applications for certain collective works. When registering an album together with the works on that album, the Copyright Alliance asserted that applicants should identify the complete content of the album. Specifically, the Copyright Alliance suggested that section 618.7(B)(2) should be revised to state that titles of the individual works should be included in the "Content Titles" field, even if the applicant intends to exclude one or more of those works from the claim. The Copyright Alliance said this would provide a clear record of what the album contains and makes the titles accessible in the online public record.<sup>9</sup>

The Office declines to adopt the Copyright Alliance's suggestion at this time. The Office encourages applicants to provide album information as suggested by the Copyright Alliance, but it will not require applicants for all collective works to submit all similar information. Requiring applicants to provide contents titles for an album may be feasible, but applying the same requirement to all types of collective works may be burdensome for some applicants. That said, the Office plans to revise the sections on collective works consisting of musical works and/or

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means for obtaining a registration. If applicants could register multiple works as a unit of publication whenever they happen to be fixed in the same medium of expression, the regulatory accommodation would displace the statutory scheme, and this narrow exception would become the default method for registering published works.

<sup>9</sup> Similarly, one individual asked the Office to add a new space to Form TX where applicants may provide titles of the works appearing within a unit of publication. The Office declines to adopt this suggestion, because the *Compendium* already provides instructions for adding title information to a paper application. See *Compendium* section 1107.4(C).

sound recordings in a future update to the *Compendium*, and will revisit the Copyright Alliance's suggestions in making those revisions.

Additionally, the Copyright Alliance contended that the Office will not register a collective work unless it contains at least four independent works (citing *Compendium* sections 312.2, 618.7, and 803.8(F)(4)). The Copyright Alliance said this is a problem for the recording industry, because extended play albums ("EPs") often contain two or three tracks. In such cases, the individual tracks must be registered separately. It also said this creates a workflow problem for the record labels because, although EPs are a single product, they cannot be registered in a manner that reflects the way they are commercially distributed.

The Office registers "original works of authorship," as defined in sections 102 and 103 of the Copyright Act. A compilation may be registered if it contains a sufficient amount of creative expression in the selection, coordination, and/or arrangement of its component elements. These requirements are set forth in the statute, and the Office adheres to this standard when it examines an album or any other type of compilation. The vast majority of albums contain sufficient selection, coordination, or arrangement authorship to be considered a collective work, but some albums do not satisfy this requirement. The Office recognizes that in such cases, a separate application may be required for each individual track, and that this may increase the incremental cost and effort of seeking a registration. But, contrary to the Copyright Alliance's suggestion, the Office does not have a bright line rule regarding the number of tracks that must be present to qualify as a collective work; the Office will simply scrutinize collective work applications with fewer tracks more closely to ensure they pass the necessary threshold of creativity.

Dated: September 27, 2017.

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of the U.S. Copyright Office.*

**[BILLING CODE 1410-30-P]**

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