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FIXING COPYRIGHT REGISTRATION FOR ONLINE VIDEO CREATORS:
THE CASE FOR GROUP REGISTRATION OF PUBLISHED VIDEOS

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Fixing Copyright Registration for Online Video Creators: The Case for Group Registration of Published Videos

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Since the Copyright Act of 1976, there's been enormous growth in the volume of video content produced, and the options for video distribution. The 1976 Act was created in a world where movie and TV studios produced the only commercially viable video content, in the form of films and television shows, and distributed

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through a limited number of theatres and networks. Today the public creates video content in vast quantities, and much of it is used in commercial endeavors from YouTube channels to social media influencers. Yet copyright registration of published video content has changed little since the Copyright Act of 1976. Since the 1976 Act, while the Copyright Office adapted its regulations to permit group registration of other published media including serials, newspapers, newsletters in the 1990s, with photographs added in 2002, published video remains untouched.

This article will consider the history of published group registration since the Copyright Act of 1976, and argue that future modernization efforts should include group registration of video. The article addresses key problems with the current prohibition on group registration of published videos and suggests the way creators currently make videos can be analogized with the works currently acceptable for group registration post-publication.

Specifically, Part I explores how current video registration options are ineffective and cost-prohibitive for online video creators because there is no group registration option for published videos. Part II analyzes the current list of acceptable works for post-publication group registration and analogizes online video to those works to show that online video production and consumption follow the same trajectory as other works now able to be registered as a group post-publication. Next, Part III argues that the Copyright Office should open a rulemaking to establish group registration of published videos and further proposes ideas on how to eliminate unnecessary challenges for online video creators.

I. The Current Video Registration Options Are Unable to Effectively Provide Online Video Creators with Reasonable Registration Options

Online video creators produce a large amount of copyrightable content. YouTube, the most popular online video host, has roughly 576,000 hours of video content uploaded daily.² This has allowed YouTube to amass billions of videos on its site.³ YouTube is only one provider, however, and the universe of online video expands exponentially when you consider those who create short and long form video for other platforms like Instagram, Snapchat, Twitch, Twitter, Vimeo, Facebook, and more.

While it is true that online video creators could use the group registration of unpublished videos option for copyright registration, this is often practically unavailable due to the content of the videos and the need to publish before registering. In order to gain viewership and maintain cultural relevance, content creators must post or publish their videos online in a timely fashion. Many of the most popular

² Kevin Tran, *Viewers find objectionable content on YouTube Kids*, BUSINESS INSIDER (Nov. 7, 2017), https://www.businessinsider.com/viewers-find-objectionable-content-on-youtube-kids-2017-11?utm_source=feedly&utm_medium=referral.

³ Salman Aslam, *YouTube by the Numbers: Stats, Demographics, & Fun Facts*, OMNICORE, <https://www.omnicoreagency.com/youtube-statistics/> (last updated Sept. 5, 2019).

online videos include new product reviews, game or film reviews, commentary on current events, and the newer trend of filming reactions to music, movies, or current events.⁴ The timeliness of these videos is a key part of their value, and makes it practically impossible for creators to stockpile a group of unpublished videos to register. Not unlike the writers of short online literary content, if these online video creators are required to make daily registrations, it would be prohibitive in both time and money and would “[render] registration effectively unavailable.”⁵

At New Media Rights, we deal directly with online video creator clients who face these hurdles in the registration process when seeking to protect their work. These creators have often heard of the benefits of copyright registration, but they soon discover that the system does not allow them to group register their videos post-publication. Many of these creators have hundreds or thousands of videos on their channels, and produce and publish multiple videos a week. However, because of the timeliness of the videos, they do not have the luxury of waiting to upload their content to an online video service until their group registration of unpublished videos has been filed (or approved).

Currently the only option these creators have is to register the videos individually after uploading. Since there is not an option for these creators to group register videos that have already been published, it can be time and cost prohibitive for a creator to register each video that they’ve uploaded to an online video service post-publication, especially if they produce mass quantities of videos. As a result, most video creators that we have worked with choose not to register all of their online videos, but rather choose to register select videos once they become popular or hit a certain viewership threshold. Video creators with fewer resources are left frustrated by this single-video registration process and struggle to determine how they can most effectively protect their work.

Ultimately, creators with fewer resources opt not to register some, most, or even all of their work. Lacking registration of their work, those same creators with fewer resources become second class copyright owners: they have less ability to enforce their rights against larger companies that infringe their copyrighted work in the future. Often, regardless of the strength of their case, when creators attempt to hire a copyright litigator in the case of blatant infringement where the work in question is not registered, they find litigators refuse to take their cases.

⁴ YOUTUBE TRENDING, <https://www.youtube.com/feed/trending> (last visited Jan. 8, 2019).

⁵ See Nat’l Writers Union et al., Comments and Petition for Rulemaking on Notice of Proposed Rulemaking: Group Registration of Contributions to Periodicals at 4 (Jan. 30, 2017), <https://www.regulations.gov/contentStreamer?documentId=COLC-2016-0013-0003&attachmentNumber=1&contentType=pdf> (noting that writers who create granular or frequently updated works distributed electronically face time and cost issues if they have to register each work individually).

II. Online Videos are Similar to Other Works Where Published Group Registration is Permitted, and Should be Afforded the Same Opportunity for Group Registration

Copyright law gives the Register discretion to allow “a single registration for a group of related works.”⁶ Congress has further recognized that requiring all works to be registered in separate applications with separate fees will impose “unnecessary burdens and expenses.”⁷ Considering these factors, the Copyright Office has allowed for the group registration of certain published works including: photographs,⁸ serials,⁹ newspapers,¹⁰ and newsletters.¹¹ We will briefly discuss the history of published group registrations for each of these works below to show that online videos should follow a similar path. Since the trajectory of the production and consumption of online videos is very similar to these works that already receive published group registration options, online videos should be included in the works available for published group registration as a further adaptation of the law in order to keep pace with technological and cultural advances.

A. Photographs

Photographs are one of the types of works that were originally considered by Congress for group registration.¹² This is likely due, at least in part, to the fact that there were roughly 10 billion photographs taken each year in the 1970s.¹³ With so many photographs being taken, people who wanted to protect their photos would not efficiently be able to do so while limited to a single registration system. Importantly, it was during the congressional hearings on the proposed Copyright Reform Act of 1993 that the frustrations of photographers made it clear that group registration could provide a significant benefit to creators who produce large quantities of works.¹⁴ During the hearings, photographers argued that because they were unable to predict the popularity of their photographs, they would need to register each individual photograph to afford them the highest level of protection, and that this would be a

⁶ See 17 U.S.C. § 408(c)(1) (2005).

⁷ H.R. Rep. No. 94-1476, at 154 (1976).

⁸ Group Registration of Photographs, 83 Fed. Reg. 2542 (Jan. 18, 2018) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(i)).

⁹ Registration of Claims to Copyright: Group Registration of Serials, 55 Fed. Reg. 50556 (Dec. 7, 1990) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(d)).

¹⁰ Group Registration of Newspapers, 83 Fed. Reg. 25375 (June 1, 2018). (codified with subsequent amendments at 37 C.F.R. pt. 202.4(e)).

¹¹ Registration of Claims to Copyright; Group Registration of Daily Newsletters, 60 Fed. Reg. 15847 (Mar. 28, 1995). (codified with subsequent amendments at 37 C.F.R. pt. 202.4(f)).

¹² H.R. Rep. No. 94-1476, at 154 (1976).

¹³ Jonathan Good, *How Many Photos Have Ever Been Taken?*, 1000 MEMORIES BLOG (Sep. 15, 2011), <https://web.archive.org/web/20130116130505/http://blog.1000memories.com/94-number-of-photos-ever-taken-digital-and-analog-in-shoebox>.

¹⁴ Registration of Claims to Copyright, Group Registration of Photographs, 66 Fed. Reg. 37142, 37143 (July 17, 2001) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(i)).

burden.¹⁵ Furthermore, testimony was offered that legal professionals found the system to be unjust because it failed to adequately offer protection, and saw that clients who could not register because of the obstacles they faced in relation to time and money were left without appropriate redress and often were unable to find lawyers to pursue their infringement claims.¹⁶ Photographers argued that to follow the registration requirements would “require[] a tremendous amount of time and effort to submit a copy of each image that they wished to register and that registration was financially burdensome.”¹⁷ Finally, in 2001 the Register allowed for the group registration of published photographs.¹⁸ At this point in history, roughly 86 billion photographs were taken a year.¹⁹ Most recently, the Copyright Office suggested and later set a limitation on the number of photographs that could be registered to 750, but allowed unpublished photographs to be included in the acceptable categories for group registration.²⁰

B. Serials

Serials are print or non-print publications that are issued in parts and are expected to continue indefinitely, such as a magazine.²¹ In the early 1990s the Copyright Office adopted a rule that allowed for the group registration of serials.²² They were limited to those serials which were published at intervals of a week or more, within a three-month period, and were within a year of their publication.²³ The request for this change was made by representatives of publishers who argued that the “costs in making separate registrations for each issue constitut[ed] a significant burden.”²⁴ More recently, this industry has faced declining sales due to a shift to

¹⁵ See Copyright Reform Act of 1993: Hearings on H.R. 897 Before the Subcomm. On Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 384-85 (1993) (“We do not know what photographs will be infringed so we would need to register each and every photograph. [. . .] If we were to register each week’s production at each studio as an unpublished collection, we would make nearly 50,000 group registrations per year”).

¹⁶ *Id.* at 620-22 (“From first-hand experience I can say that copyright infringement upon visual art, particularly photographs, is widespread and more often than not, the infringers pay nothing. [. . .] It’s only a photo.” Actual damages are often under \$25,000.00 and infringers understand very well that in most cases litigation fees and costs would exceed the damages. [. . .] I usually go on to explain that the artist would be unhappy with me as well if we pursued a case where the attorneys’ fees and court costs exceed the damages recovered and that pursuing such claims often generate bad will between the attorney and client, even when an injunction is granted.”).

¹⁷ Registration of Claims to Copyright, Group Registration of Photographs, 66 Fed. Reg. 37142, 37143 (July 17, 2001) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(i)).

¹⁸ *Id.* at 37143.

¹⁹ Good, *supra* note 13.

²⁰ Group Registration of Photographs, 83 Fed. Reg. 2542 (Jan. 18, 2018) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(i)).

²¹ LIBRARY OF CONGRESS, *ISSN is for Serials*, (Feb. 19, 2010), <https://www.loc.gov/issn/issnbro.html>.

²² Registration of Claims to Copyright: Group Registration of Serials, 55 Fed. Reg. 50556 (Dec. 7, 1990) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(i)).

²³ *Id.* at 50556.

²⁴ *Id.*

digital advertising and the challenges associated with adapting to a digital platform.²⁵ Notwithstanding these industry concerns, the Copyright Office is still working to accommodate these creators by continuing to allow group registration and working to make it more efficient by proposing new rule changes.²⁶ Currently the Library of Congress maintains approximately 70,000 current serial publications in their reading room.²⁷

C. Newsletters

Newsletters are the middle ground between serials and newspapers because they are published at least two times per week.²⁸ In 1995, when the internet was in its infancy, the Copyright Office adopted a rule that allowed for the group registration of newsletters that were published within a month.²⁹ Not unlike newspapers and serials, the Copyright Office has amended this rule to accommodate newsletters as they have evolved, first by extending the period of publication to three months and most recently eliminating the deadline entirely.³⁰ In contrast to serials and newspapers, the market for newsletters has not declined and in fact has found more utility in the digital age.³¹

D. Newspapers

Newspapers are another example of a work that Congress deemed acceptable to register as a group.³² As with serial publications, the Copyright Office has worked

²⁵ See generally Justine Jordan, *According to a New Report, Last Year was a Very Bad Year for Print Magazines*, THE FASHION SPOT (Aug. 9, 2018), <https://www.thefashionspot.com/runway-news/799011-print-magazines-in-decline/>.

²⁶ See Group Registration of Serials, 83 Fed. Reg. 22896 (May 17, 2018) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(d)).

²⁷ LIBRARY OF CONGRESS, *About the Serial and Government Publications Division* (May 27, 2016), <https://www.loc.gov/rr/news/brochure.html>.

²⁸ Registration of Claims to Copyright; Group Registration of Daily Newsletters, 60 Fed. Reg. 15874, 15874 (Mar. 28, 1995) (codified with subsequent amendments at 37 C.F.R. § 202.4(f)).

²⁹ *Id.* at 15874-75.

³⁰ Group Registration of Newsletters, 83 Fed. Reg. 22902, 22903 (May 17, 2018) (codified with subsequent amendments at 37 C.F.R. § 202.4(f)).

³¹ See Graham Winfrey, *Email Newsletters: Yes, They Still Rule*, INC. (June 30, 2014), <https://www.inc.com/graham-winfrey/why-email-newsletters-are-king.html>. (“The New York Times reports that e-newsletters are growing in popularity despite the fact that young people prefer texting and instant messaging to dealing with their inboxes.”); see also David Carr, *For Email Newsletters, a Death Greatly Exaggerated*, THE NEW YORK TIMES (June 29, 2014), <https://www.nytimes.com/2014/06/30/business/media/for-email-a-death-greatly-exaggerated.html>. (“Email newsletters, an old-school artifact of the web that was supposed to die along with dial-up connections, are not only still around, but very much on the march.”)

³² H.R. Rep No. 94-1476 at 154 (1976). “The provision empowering the Register to allow a number of related works to be registered together as a group represents a needed and important liberalization of the law now in effect. At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems and has resulted in unnecessary burdens and expenses on authors and other copyright owners. In a number of cases the technical necessity for separate applications and fees has caused copyright owners to forego copyright altogether. Examples of cases where these undesirable and unnecessary results could be

recently on refining the rules for the group registration of newspapers.³³ This rule specified that newspapers should be distinguished from daily newsletters or other serials in order to clarify these works as different groups for registration.³⁴ Not unlike magazines and other serials, the newspaper industry has suffered a decline on a number of fronts, and a varying degree of success to adapt to the digital age.³⁵ The current number of newspapers kept at the Library of Congress is approximately 1,000,000.³⁶ Regardless, the availability and maintenance of group registration continues to provide a benefit to the newspaper industry from which video creators would equally benefit.

Despite the challenges faced by each of the industries discussed above, the Office is still working toward maintaining a reasonable and efficient method of group registering published newspapers, newsletters, serials and photographs. Video creators, whose industry has changed so much over the last few decades, deserve these same considerations to modernize the registration system.

Group registration of published videos is appropriate for video creators because of market changes since the 1970s and similarities with existing categories of works where group registration of published works is allowed.

Video creation and consumption has changed dramatically over the last few decades. At the time of the passage of the 1978 Copyright Act, motion pictures and video tapes were not always available in “normal trade channels.”³⁷ The home video market was just beginning to take hold in the late 1970s thanks to the consumer availability of the video cassette.³⁸ Since the 1978 Copyright Act approval, and the approval of group registrations of photos, serials, newspapers, and newsletters in the 1990s and early 2000s, video production and consumption has boomed. In the 1980s and ‘90s video cameras and editing equipment became more widely available to the public, making video production outside of television and movie studios more common. This trend continued into the 2000s, with video recording and editing

avoided by allowing a single registration include the various editions or issues of a daily newspaper, a work published in serial installments, a group of related jewelry designs, a group of photographs by one photographer, a series of greeting cards related to each other in some way, or a group of poems by a single author.”

³³ Group Registration of Newspapers, 83 Fed. Reg. 4144 (Jan. 30, 2018) (codified with subsequent amendments at 37 C.F.R. § 202.4(e)).

³⁴ Group Registration of Newspapers, 82 Fed. Reg. 51369, 51371 (Nov. 6, 2017) (codified with subsequent amendments at 37 C.F.R. § 202.4(e)).

³⁵ See generally *Newspapers Fact Sheet*, PEW RESEARCH CENTER (June 13, 2018), <http://www.journalism.org/fact-sheet/newspapers/>.

³⁶ Library of Congress, *supra* note 27.

³⁷ H.R. Rep No. 94-1476, at 152 (1976).

³⁸ See Priya Ganapati, *June 4, 1977: VHS Comes to America*, WIRED (June 4, 2010), <https://www.wired.com/2010/06/0604vhs-ces/>. (Stating that in the 1970s the VHS videocassette format became commercially available in North America and with the introduction of the technology, “[t]he idea of a home-use VCR captured consumers’ imagination and was set to become one of the hottest home electronics products.”).

equipment becoming more accessible and affordable. The first video on YouTube was posted in 2005, and today over 576,000 hours of video are uploaded onto the site each day.³⁹ YouTube is the second most visited site in the United States.⁴⁰ They also boast over 1.8 billion logged-in visitors a month.⁴¹ With these statistics, the ubiquity of recording devices through phones and other technology, and the many other services where individuals share video including Instagram, Snapchat, Twitch, Twitter, Vimeo, and Facebook, it is unlikely that the popularity of online video will slow anytime soon.

It's time to adapt and update our registration process for today's video production. With the bulk of videos being produced by individual creators, registering a single video at a time in one application is not efficient or cost effective. These individuals wear many hats, often writing, directing, producing, editing, and even starring in their videos. They also have to handle marketing, accounting, and other duties of a small business. An inefficient and expensive registration process is one more burden on their creative efforts.

Furthermore, any argument that the current option of registering a group of unpublished videos is an effective solution ignores the key element of timeliness. The requirement that the group of videos must be unpublished creates a large barrier for those creators who create videos that are of a viral or timely nature, such as political or cultural commentary that happens in real time on the internet. If the creator has to withhold a video (so that it is technically unpublished for the sake of group registration), then the video loses value for both the creator and the public. Allowing video creators to register groups of published videos removes that barrier for creators because it allows them to participate in active conversations.

Video creators should be afforded post-publication group registration similar to photos, newspapers, serials, and newsletters. Allowing published videos to be group registered will further the Copyright Office's goal of encouraging registration,⁴² and level the playing field for creators with fewer resources by providing the ability to protect their work in a meaningful way.

III. Considerations for Modernizing the Current System and Undertaking Future Rulemakings

A. Dynamic Pricing Should be Considered to Make Copyright Registration More Affordable for Individual Video Creators

Without more affordable and efficient registration options for videos, there is a

³⁹ Aslam, *supra* note 3.

⁴⁰ *The Top 500 Sites on the Web*, ALEXA (Jan. 8, 2019), <https://www.alexa.com/topsites>.

⁴¹ Ben Gilbert, *YouTube now has over 1.8 billion users every month, within spitting distance of Facebook's 2 billion*, BUSINESS INSIDER (May 4, 2018), <https://www.businessinsider.com/youtube-user-statistics-2018-5>.

⁴² Group Registration of Newspapers, 83 Fed. Reg. 4144 (Jan. 30, 2018) (codified with subsequent amendments at 37 C.F.R. pt. 202.4(e)).

two-tiered system that arises. Timely registration allows the copyright owner to recover statutory damages and attorneys' fees⁴³,⁴⁴ which is often critical to a copyright owner's ability to enforce their rights. Without registration, copyright owners are only entitled to actual damages and profits of the infringer, which in many situations may be miniscule. Currently, although video creators are subject to the same registration rules and fees as major motion picture studios, the system puts them at a disadvantage. Movie studios and media companies might have the personnel and capital to protect each of their videos individually, but the emerging creator will likely be forced to selectively choose which videos to register, leaving many of their videos without the benefits of registration. As previously discussed, these online video creators cannot rely on their ability to register their videos as unpublished collections because of timeliness issues, and relying on submitting individual applications is a prohibitively expensive and time-consuming burden.

In addition to creating obstacles to registration, this system makes it significantly more challenging for these online video creators to enforce their copyrights. By setting fees that are more representative of the work, perhaps adjusting fees for feature films versus shorter online videos, it would make the system more inclusive and make it more likely for smaller channels to register their work. Take the example of an hour and forty-minute feature film, versus twenty 5-minute videos. Under the current regime, an individual video creator that wants to register twenty 5-minute videos would pay twenty times as much as a film studio to register the same amount of video. The administrative burden for the Office to process the twenty short online videos versus the single feature film is not clearly twenty times as much. In fact, the feature film might contain many previously registered works, such as music, that will need to be disclaimed. At the same time, the online videos in this example might contain solely original content from a single creator. Factor in the disparity of resources between a film studio with legal counsel and large budgets, compared to many online video creators who lack counsel and significant resources, and you have significant arguments in favor of adaptive pricing that levels the playing field for individual video creators.

B. Pricing Should Not be Focused on the Goal of Producing Income for the Copyright Office, or Even Recouping the Costs, but on Considerations of How to Put Creators on Equal Footing with Regards to Their Rights to Registration and Enforcement

New Media Rights supports the Copyright Office moving towards an all-digital registration, provided that it is adopted in a way that further accommodates those who have a desire to have their work protected, and puts individual creators on equal footing with large media companies. This is especially true if the digital system will help to reduce costs and make the registration system more affordable, which seems

⁴³ 17 U.S.C. §§ 504-505 (1976).

⁴⁴ 17 U.S.C. §§ 504-505 (1976).

to be the case based on the Office's discussion of how costly and time-consuming administration of paper applications has been.⁴⁵ A dynamic pricing model that significantly reduces registration costs for online video creators who currently leave most work unregistered may even significantly increase the number of works being registered, offsetting the difference in any lost revenue while also ensuring individual creators receive the same protections as large media companies.

At the very least, we propose that further discussions with economists and stakeholders should take place to determine the appropriate pricing model for videos, because these experts could suggest price points that would best match the Office's competing goals of providing accessible registration while also generating income and recouping costs. Regardless of the model that is adopted, the Office should strongly consider a need-based fee reduction for those who can demonstrate they cannot afford the registration costs, but want the benefit of registration to protect their work. We have seen in practice emerging creators who have had their work infringed by much larger media companies, and are unable to fully enforce their rights against these companies due to failure to timely register their works.

C. The Copyright Office Should Hold a Rulemaking to Consider Adopting a Group Registration for Published Video Content

The first step to addressing the issues mentioned would be to open a rulemaking to consider adoption of group registration for published video content. Without an option to register a group of published video content, online video creators will continue to be deprived of the advantages of group registration and ultimately be neglected by the current boundaries of the copyright registration system. The Copyright Office should open a rulemaking to adopt a new rule for a group registration option for published videos. Registration is effectively unavailable for online video creators because using the standard application to register each individual video, which is generally their only option, is cost prohibitive and burdensome given the volume of work produced and uploaded. As discussed, this is the most efficient method to accommodate the ever-growing needs of the online video community, encourage registration, and allow creators to exercise their statutory rights to enforce their copyright if they should find themselves in that position. This update to the registration system will better reflect the current technological and cultural reality.

IV. Conclusion

Moving forward, efforts to modernize the registration system must focus on better meeting the needs of the individuals and entities that produce video content today, with an eye toward building a system that can adapt as video production and

⁴⁵ See Registration Modernization, Notification of Inquiry, 83 F.R. 52336, 52338-39 (Oct. 17, 2018) (“[P]aper applications are more costly to process than electronic applications, and the corresponding filing fee for a basic registration submitted on a paper form is \$85 (compared to \$55 for a basic registration submitted on an electronic form.”).

distribution continues to evolve. Modernization should include permitting group registration of published videos, fixing current issues that exist with the eCO system, and enhancing the ability of copyright holders and users to create and access public information. The result will be a more equal playing field for copyright holders, a more usable registration system, and increased creative and licensing opportunities.