

**BEFORE THE
UNITED STATES COPYRIGHT OFFICE
WASHINGTON, D.C.**

**NOTIFICATION OF INQUIRY REGARDING
ONLINE PUBLICATION**

**PUBLIC COMMENTS OF
AUTHORS ALLIANCE**

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Andrew Gass
Joseph Wetzel
Kristine Hanson
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095

Sarang Vijay Damle
LATHAM & WATKINS LLP
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201

Peter Durning
LATHAM & WATKINS LLP
355 South Grand Avenue, Suite 100
Los Angeles, CA 90071-1560
Telephone: (213) 485-1234
Facsimile: (213) 891-8963

I. INTEREST OF AUTHORS ALLIANCE IN THIS NOTIFICATION OF INQUIRY

Authors Alliance is pleased to provide these comments in response to the Notice of Inquiry (the “NOI”) published by the Copyright Office on December 4, 2019 regarding online publication. *See* 84 Fed. Reg. 66,328 (Dec. 4, 2019).

Authors Alliance is a 501(c)(3) nonprofit organization with the mission to advance the interests of authors who want to serve the public good by sharing their creations broadly. In furtherance of this mission, Authors Alliance provides resources to help authors understand and enjoy their rights, and promotes policies that make knowledge and culture available and discoverable. Authors Alliance’s more than 1,800 members wish to see their works reach the largest possible audience and have the greatest possible impact and use. To support these goals, Authors Alliance gives a voice to authors in legal and policy discussions (such as this NOI) that might promote or inhibit the broad dissemination its membership seeks.

II. AUTHORS ALLIANCE’S COMMENTS

The NOI poses a total of seven questions, numbered 1-5 and 7-8.¹ The subheadings below identify the order in which Authors Alliance answers these questions, beginning with the questions regarding rulemaking (No. 3) and guidance (Nos. 1 and 2), and then discussing the authority of the Copyright Office to issue rules and guidance in this area (Nos. 7 and 8). In the final section, Authors Alliance comments briefly on the logistical issues raised by Question Nos. 4 and 5.

A. Response to Question No. 3: The Registration Rules Should Recognize the Reality that Many Works Are Published Online

The NOI’s Question No. 3 asks whether the Copyright Office should promulgate a regulation to allow applicants to identify a work as having been first published “online.”² The answer to that question is emphatically yes. In the Internet age, distribution through online, digital, and electronic channels is the primary means by which copyrightable content reaches the public at large, and has eclipsed if not eliminated many traditional, non-electronic forms of distribution. There is no reason why applicants should not have the option to specify such a widespread mechanism of distribution as the means by which their works were published.³

Question No. 3 also asks whether the Copyright Office “can” promulgate such a regulation, and whether an applicant’s decision to identify the place of first publication as “online” should be without prejudice to another party’s challenge to a registered work’s status, time, and place of publication.⁴ The answer to both questions is also yes. Section II.D. below discusses the authority of the Copyright Office to conduct rulemaking in this area, and concludes that the Copyright Office

¹ There is no Question No. 6. *See* NOI, 84 Fed. Reg. at 66333-34.

² *See* NOI, 84 Fed. Reg. at 66333-34.

³ To be sure, distribution and publication are not equivalent concepts—but they are closely related. *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1303 (11th Cir. 2012) (“Central to the determination of publication is the method, extent, and purpose of distribution.”); *id.* at 1303 n.10 (noting that “distribution” is not a term defined by statute); *see also* 17 USC § 101 (defining “[p]ublication” by reference to certain kinds of “distribution” or “[t]he offering to distribute copies . . . for purposes of further distribution . . .”).

⁴ *See* NOI, 84 Fed. Reg. at 66333-34.

does have such authority and no action by Congress is required. At the same time, however, current law requires that any “facts stated in the certificate” of registration are merely *prima facie* evidence of their validity.⁵ Thus, an applicant’s decision to identify a work’s place of first publication as “online” must be without prejudice to another party’s ability, before an appropriate court or other body, to argue that the work’s first publication was elsewhere.

B. Response to Question No. 1: The Registration Guidance with Respect to the “Date and Nation” of Publication

The NOI’s Question No. 1 asks what regulatory guidance should be given to applicants in identifying the “date and nation” of an online work’s first publication.⁶ As commentators have noted (and the NOI itself recognizes), the answers to these questions bear significant consequences under the copyright laws, but on different dimensions.⁷

The date of first publication primarily impacts the period during which certain copyright and copyright-related interests and protections take effect. Most notably, the date of first publication serves as a trigger for a creator’s abilities to (1) claim statutory damages and attorneys’ fees under Sections 504 and 505; (2) use registration as *prima facie* evidence of copyright validity under Section 410(c); and (3) terminate transfers under Section 203(a)(3) of the 1976 Copyright Act.⁸ The date of first publication also affects the scope of fair use (because a work’s unpublished status is likely to weigh against a finding of fair use), and the time at which anonymous works, pseudonymous works, or works for hire enter the public domain.⁹ Thus, in general, the date of publication has significant effects on *when* and *to what extent* a creator can exercise his or her rights under U.S. copyright law.¹⁰

The nation of first publication has a variety of separate implications.¹¹ Most dramatically, Section 104(b) of the 1976 Copyright Act removes from the scope of federal copyright law works that were first published neither in the United States nor in a treaty party, with limited exceptions.¹²

⁵ 17 U.S.C. § 410(c).

⁶ See NOI, 84 Fed. Reg. at 66333. Specifically, Question No. 2 asks whether the Copyright Office should develop additional rules or guidance regarding how to authorize others to reproduce an online work; whether a conditional or restricted distribution constitutes publication; and whether advertising works online or on social media constitutes publication. Question No. 1 is limited to the issues of “the date and nation of first publication.”

⁷ See, e.g., 1 NIMMER ON COPYRIGHT § 4.01[A]; Thomas F. Cotter, *Toward a Functional Definition of Publication in Copyright Law*, 92 MINN. L. REV. 1724, 1728-51 (2008) (providing an overview of “why publication continues to matter”); Deborah R. Gerhardt, *Copyright Publication: An Empirical Study*, 87 NOTRE DAME L. REV. 135, 137 (2011) (“Publication is a magic moment in copyright law.”); NOI, 84 Fed. Reg. at 66329-30.

⁸ See, e.g., NOI, 84 Fed. Reg. at 66329; Cotter, *supra* note 7, 92 MINN. L. REV. at 1732-39.

⁹ See NOI, 84 Fed. Reg. at 66329 (citing 17 U.S.C. §§ 302(c) and 107); Cotter, *supra* note 7, 92 MINN. L. REV. at 1740-41.

¹⁰ Additional impacts of the date of first publication (and of publication more generally) are listed at 1 NIMMER ON COPYRIGHT § 4.01[A].

¹¹ See, e.g., NOI, 84 Fed. Reg. at 66329-30; Cotter, *supra* note 7, 92 MINN. L. REV. at 1742-45.

¹² See 17 U.S.C. § 104(b).

In addition, under Section 411(a) of the 1976 Copyright Act, failure to register bars a suit for infringement of any “United States work.”¹³

The distinct effects of the “date” and “nation” criteria call for distinct inquiries into how they should be treated when drafting interpretive guidance on the statutory term “Publication.”¹⁴

1. The Date: Registration Guidance Should Establish a Presumption that a Work Was Published Whenever It Was First Offered for Distribution Through a Website or Other Resource Accessible to the General Public

The Copyright Office should adopt guidance that “Publication” occurs when a work is first offered, under the rights-owner’s authority, for viewing online without technological restrictions that prevent downloading or other reuse. This guidance should clarify that such a posting is *sufficient* to constitute a “Publication,” but not *necessary*. There is a broad range of other mechanisms by which a work—whether embodied in a digital copy or another medium—is undoubtedly and appropriately considered published (including without limitation when an e-book is distributed, even with technological protection measures (“TPM”) or digital rights management (“DRM”) tools limiting downloads or further distribution). But such alternate modes of “Publication” should not be addressed by the Copyright Office’s anticipated guidance. By the same token, however, the guidance should clarify that *non-technical* restrictions—for example, a fee to download, paywalls, requirements to log in to access content, or the inclusion of licensing terms that impose *legal* limits on reuse or distribution—should not alter the result that a work posted online without technological restrictions that prevent downloading or other reuse does constitute “Publication.”

The position articulated here aligns with Professor Goldstein’s view, which is well founded for several reasons (including those summarized in the NOI).¹⁵ There are two salutary characteristics of this approach, however, that deserve special emphasis.

a. Equating Publication with Unrestricted Online Distribution Fosters Much-Needed Clarity in the Copyright Laws

First, to equate publication with an online distribution that lacks a technological barrier to downloads or redistribution adds much needed clarity on a question that has bedeviled copyright

¹³ 17 U.S.C. § 411(a); *Kernel*, 694 F.3d at 1301 (“[A]lthough ‘registration is not a condition of copyright protection,’ registration (or a refusal of registration) of a United States work ‘is a prerequisite for bringing an action for copyright infringement.’”) (citations omitted); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 891 (2019) (“Time and again, then, Congress has maintained registration as prerequisite to suit, and rejected proposals that would have eliminated registration . . .”).

¹⁴ The Copyright Office should take care to avoid the “one-word-one-meaning only fallacy” that has led many courts to leave “the term ‘publication’ . . . clouded by semantic confusion.” *American Visuals Corp. v. Holland*, 239 F.2d 740, 742 (2d Cir. 1956). Faithfulness to the statutory scheme—and the ways in which “Publication” flows into it—requires a recognition that “the term is defined for different purposes.” *Id.*; see also Cotter, *supra* note 7, 92 MINN. L. REV. at 1788 (“[P]ublication has been pressed into service for too many disparate purposes. A more rational copyright policy might focus on the consequences that now follow from the fact, date, or place of publication . . .”).

¹⁵ See NOI, 84 Fed. Reg. at 66332-33 (citing GOLDSTEIN ON COPYRIGHT § 3.3.3 (3d ed. 2016)).

registrants and practitioners since the advent of the internet.¹⁶ Indeed, recent case law from the Ninth Circuit demonstrates that in the context of registration, the need for clarity is at its apex in order to protect creators' rights. Specifically, in *Gold Value Int'l Textile, Inc. v. Sanctuary Clothing, LLC*, the Ninth Circuit voided a plaintiff's copyright registration based on the finding that "it included inaccurate information in its application for copyright registration" by misrepresenting the prior publication status of related works.¹⁷ The court reached that result over the plaintiff's objection "that it did not believe that such sales constituted publication as a matter of law," even though the plaintiff's position was not fraudulent (merely, in the court's view, "unreasonable").¹⁸ *Gold Value* underscores the dangers of unclear guidance on this issue, given that "Publication" already "denot[es] a process much more esoteric than is suggested by the lay definition of the term."¹⁹ The Copyright Office should craft interpretive guidance that minimizes the risk of transforming the stability of copyrights into a function of *ad hoc* judgments regarding the reasonableness or good faith of an applicant's parsing of the copyright laws.²⁰

Equating publication with online posting, absent technological restrictions on downloads or distribution, serves that clarifying goal—and does so in a way that is not only consistent with, but compelled by, the operative statutory text. Importantly, the definition of "Publication" is not limited to a "distribution" of the work; it also encompasses "offering to distribute copies" of the work "to a group of persons for purposes of further distribution, public performance, or public display."²¹ That descriptive category precisely encompasses the act of making a work available for users to download themselves, thereby effectuating a *bona fide* "distribution" within the meaning of prevailing doctrine.²² Among the general public, content that is freely downloadable on the world wide web is presumptively "offered" for further circulation and incorporation into the broader public discourse. Particularly in an Internet culture that is highly referential, and marked by memes, links, remixes, and reposts, a downloadable online work is assumed to be a contribution—*i.e.*, an "offering"—to that cultural mosaic, rather than a monolith that stands alone. It is therefore no surprise that "the weight of authority favors the view" that works are "published . . . by uploading them to the internet."²³

Some commentators have suggested that this approach conflicts with the principle that a publication only occurs when reproduction and distribution is authorized by the copyright owner, and that posting a work online is better categorized as a "public performance or display," which "does not of itself constitute publication."²⁴ There are many flaws in this critique. As Professor Goldstein explains, the 1976 Copyright Act's exception for "public performance or display" arose

¹⁶ Cf. Cotter, *supra* note 7, 92 MINN. L. REV. at 1789 (querying "whether a criterion other than publication, however defined, would be a preferable trigger for some or all of the consequences that now follow from publication" in the statutory scheme).

¹⁷ 925 F.3d 1140, 1145 (9th Cir. 2019); *see also* NOI, 84 Fed. Reg. 66330 (citing *id.*).

¹⁸ *Gold Value*, 925 F.3d at 1147.

¹⁹ 1 NIMMER ON COPYRIGHT § 4.01.

²⁰ *See Gold Value*, 925 F.3d at 1147.

²¹ 17 U.S.C. § 101.

²² This is true even though merely making a copy *available* for distribution would not constitute a distribution. When the work is merely available, no material object would "change hands." *See* NOI, 84 Fed. Reg. at 6330-31 (quoting H.R. Rep. No. 94-1476, at 138 (1976)).

²³ 1 NIMMER ON COPYRIGHT § 4.07[B].

²⁴ 17 U.S.C. § 101.

from concerns regarding technical difficulties in reproducing traditional live performances in the pre-Internet era.²⁵ Those technical concerns, which are no longer operative, should not stand in the way of a common sense and intuitive interpretation of “Publication” in the Internet era.²⁶

Moreover, when a copyright owner places a work online without technological restrictions on copying, it is not merely a “display” of that work; it is also an “offering to distribute” that work for *further* display throughout the Internet ecosystem.²⁷ To claim otherwise is to look at the issues from the wrong end of the telescope. The question should not be whether a post on the Internet (the broadest dissemination platform ever created) authorizes redistribution of a work, but whether it *forbids* it. As the NOI and academic authorities have noted, copyright owners have the technological capacity to restrict the further distribution of their online content—effectively transforming a “Publication” into a “display.”²⁸ The goal of clarity is best served by requiring copyright owners to utilize such technological solutions as a clear statement that they do not intend an online posting to constitute the “Publication” that it otherwise would naturally appear to be. Requiring that clear statement reinforces one of the key advantages of a bright-line rule equating publication with an online distribution that lacks technological restrictions on downloads or redistribution, which elevates the copyright owner’s express conduct over vague or subjective concepts such as implied authorization.

b. Equating Publication with Unrestricted Online Distribution Promotes Broader Use of Copyrightable Works

Second, in addition to clarity, to equate publication with unrestricted online distribution aligns the incentives of copyright owners and content-users appropriately. A default rule that treats an online post as a “Publication” discourages copyright owners from sleeping on their rights, while encouraging the broader public dissemination and use of copyrightable works. Indeed, although the policy underpinnings of copyright protection are frequently cast in terms of the “incentive for authors to create works,” encouraging “the public dissemination of those works is equally important,” and is an important goal of Authors Alliance.²⁹ As the Supreme Court has held, “private motivation must ultimately serve the cause of promoting broad public availability of

²⁵ GOLDSTEIN ON COPYRIGHT § 3.3.3 (3d ed. 2016) (“Congress might have imposed a different limitation, or no limitation at all, had it contemplated the widespread private copying that prevails on the Internet.”).

²⁶ *Id.*

²⁷ 17 U.S.C. § 101; *Kernel*, 694 F.3d at 1303 n.10.

²⁸ NOI, 84 Fed. Reg. at 66331 n.20 (“Modern technology may also prevent users’ practical ability to make copies of certain web pages.”) (citing 17 U.S.C. § 1201(a)); *see also* GOLDSTEIN ON COPYRIGHT § 3.3.3 & n.44 (3d ed. 2016) (“[T]he purposes served by publication, together with the dissemination over the Internet without restrictions on copying by users should be held to constitute publication. This rule leaves open the possibility that the copyright owner’s use of encryption or other technological measures to prevent copying will, if effective, forestall publication.”); Elizabeth Townsend Gard, *January 1, 2003: The Birth of the Unpublished Public Domain and Its International Implications*, 24 CARDOZO ARTS & ENT. L.J. 687, 699 (2006) (“A problem not addressed by the *Getaped.com* analysis is what happens when access controls and digital devices are put in place to prevent copying. Does the post merely become a display, and the work remain unpublished?”).

²⁹ Jake Linford, *A Second Look at the Right of First Publication*, 58 J. COPYRIGHT SOC’Y U.S.A. 585, 624 (2010).

literature, music, and the other arts[,]” and “when technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”³⁰

To serve that important purpose, interpretive guidance on the meaning of “Publication” should carefully consider the copyright remedies—and potential chilling effects—for which that term acts as a trigger. Foremost among those chilling effects is the threat posed by the statutory damages and attorney’s fees provisions of Sections 504 and 505 of the 1976 Copyright Act.³¹ Extensive scholarly investigation has demonstrated the negative impacts that the statutory damages regime can have “on individuals and technology providers alike.”³² As these and other authorities have noted, Section 504’s statutory damages regime serves multiple legislative goals, but does not fit any one of them well—and as a result, is both over-inclusive and under-inclusive in its deterrence of willful infringement.³³ Moreover, the chilling effect of statutory damages is made stronger by their unpredictability; as one treatise observed: “the truth is that statutory damages fluctuate wildly” and do not necessarily bear a “reasonable relationship” to a copyright owner’s actual damages.³⁴ For all of these reasons, a rule that increases the predictability surrounding the statutory damages regime (while decreasing the opportunities for its abuse and manipulation) would provide copyright law the “breathing space” that creativity and free expression require.³⁵

Section 412 of the 1976 Copyright Act delineates the relationship between the defined term “Publication” and the statutory damages and attorney’s fees regime of Sections 504 and 505. Distilled to its essence, Section 412 provides that no statutory damages or attorney’s fees are available for acts of infringement that commenced before registration—*unless* “first publication” of the work took place no more than three months before registration, and the acts of infringement commenced during that three-month period.³⁶ In other words, the risk of liability for statutory

³⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)), *superseded on other grounds* by the DMCA as stated in *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 941 (N.D. Cal. 2009).

³¹ See 17 U.S.C. §§ 412, 504, 505.

³² See, e.g., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 443 (2009); *id.* at 500 (“The largely compensatory purpose of statutory damages in innocent and ordinary infringement cases has been undermined by overzealous plaintiffs and judges who have failed to grasp the tripartite structure of § 504(c.)”); Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC’Y U.S.A. 265, 309-25 (2009) (arguing that statutory damages are an ineffective deterrent of infringement); Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 434 (2007) (arguing that “uncertainty in the doctrine” makes fair use incapable of overcoming copyright liability’s “chilling of creative expression”); Joseph P. Fishman, *Creating around Copyright*, 128 HARV. L. REV. 1333, 1403 (2015) (“Commentators today speak of statutory damages in the same breath as the punitive excesses of Prohibition.”).

³³ See, e.g., Samuelson & Wheatland, *supra* note 32, 51 WM. & MARY L. REV. at 500; see also Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1, 13 (2010) (arguing that the statutory damages regime “chills the creation of new works” because it “gives decisionmakers too much discretion” but also “gives them too little”).

³⁴ 1 NIMMER ON COPYRIGHT § 14.04[E][1][a][ii].

³⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

³⁶ See 17 U.S.C. § 412 (with certain exceptions, “no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for—(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work”); see generally 2 NIMMER ON COPYRIGHT § 7.16[C].

damages and attorney’s fees is a function of two moments in time that are very clear—the effective date of registration, and the three-month “grace period”—and one that is unclear and controlled by the applicant’s subjective decision to assign the work’s date of publication, which is rarely second guessed by the Copyright Office or the courts.³⁷

That state of affairs creates opportunities for manipulation of the statutory damages regime. Currently, a copyright owner could seek statutory damages and attorney’s fees for infringement of a work that was posted on the internet long ago, by promptly applying for registration and claiming the work was only “published” recently in some other medium, or that it had never been published at all. To allow such gaming to continue would reward copyright owners for sleeping on their rights, undermine Section 412’s purpose of encouraging prompt registration (thereby decreasing copyright transparency), all while increasing the uncertainties surrounding copyright liability and chilling creativity.

There is a better way. A bright-line rule equating unrestricted online distribution with “Publication” would incentivize registration, minimize uncertainty and chilling effects, and reserve statutory damages and attorney’s fees for those copyright plaintiffs who moved promptly to activate their rights.³⁸ At the same time, copyright remedies would be limited to those defendants who infringed *registered* works, or works with a publication status that was established by clear, unambiguous, and intuitive guidance by the Copyright Office.

Aside from statutory damages and attorney’s fees, the date of publication also impacts the time period in which (and ease with which) works enter the public domain. *See* Section II.B. above. On these points as well, a rule that starts the clock early—by adopting the intuitive point that no further “publication” is needed after a work is uploaded to the Internet without restriction—is best. Indeed, even skeptics of treating “Internet transmission” as “Publication” acknowledge that the results of such a rule “might increase social welfare,” while having only “some marginal negative impact on the welfare of individual authors.”³⁹

The value of creation lies in its impact on the public—and on the way those public impacts ripple back to enrich the creator’s life. These benefits, symbiotic between artist and society, represent far more than the maximum economic interests that the 1976 Copyright Act happens to assign to copyrightable works; they are the fundamental values that copyright law was created to

³⁷ *See, e.g.*, NOI, 84 Fed. Reg. at 66332 (“The Copyright Office ‘will accept the applicant’s representation that website content is published or unpublished, unless that statement is implausible or is contradicted by information provided elsewhere in the registration materials or in the Office’s records or by information that is known to the registration specialist.’”) (quoting U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 11008.3(F) (3d ed. 2017)). Similarly, in *See Rogers v. Better Business Bureau of Metro. Houston, Inc.*, 88 F. Supp. 2d 722, 731-32 (S.D. Tex. 2012) (cited in the NOI at 84 Fed. Reg. at 66332), the court deferred to the Copyright Office, which in turn deferred to the applicant’s characterization of works’ publication status in a supplementary registration application.

³⁸ Indeed, incentivizing registration is a laudable goal in itself. Robust registration records improve transparency, facilitate permission requests, and reduce the occurrence of orphan works.

³⁹ Cotter, *supra* note 7, 92 MINN. L. REV. at 1786-87. Professor Cotter also argues that “equating transmissions with publication” could be problematic because (1) it may require “website owners to deposit copies of their work with the Library of Congress,” (2) it may raise questions regarding the “country of first publication.” *See id.* The first of these issues is a ministerial and logistical concern that should not take priority over the substantive and social welfare-maximizing ends of the copyright laws. The second issue is addressed in Section II.B.2. below.

protect. And those are the values that the Copyright Office should privilege in developing its guidance regarding online publications, rather than a copyright plaintiff's pursuit of the highest possible damages in litigation.

2. The Nation: Registration Guidance on the Nation of First Publication Is Unnecessary

Unlike the “date” of first publication, there is no need for the Copyright Office to provide guidance on the “nation” of first publication. The difference in treatment between these issues is appropriate because they have different effects—the date generally triggers the period in which certain rights can be exercised, whereas the nation impacts whether those rights attach at all. *See* Section II.B. above.

The case law has addressed the “nation” question primarily through Section 411(a) of the 1976 Copyright Act, which imposes an absolute precondition of copyright registration (or denial of registration) to any suit for infringement of a “United States work.”⁴⁰ In the typical posture of these cases—including *Moberg v. 33T, LLC* and others cited in the NOI—a defendant raises Section 411(a) as a defense to suit, and the plaintiff then argues that the copyright at issue is not embodied in a “United States work.”⁴¹ In making that argument, copyright owners have been forced to contend that Internet postings do not meet the statutory definition of “United States work” by having been “first published . . . simultaneously in the United States” and another country (even though content placed on the Internet is often simultaneously available worldwide).⁴²

The courts have struggled with this fact pattern, but the Copyright Office need not. Embedded in these cases is a critical feature—the works at issue were *unregistered*. Otherwise, Section 411(a) would not have applied at all. It is therefore unnecessary for the Copyright Office to provide guidance *in the registration process* regarding the nation of an online work's first publication. Whatever the answer to that question, it becomes immaterial to Section 411(a) the moment registration is complete. Accordingly, registration guidance (the subject of the NOI) is not needed on this point.

Aside from Section 411(a), the nation of first publication also holds significance for Section 104(b) of the 1976 Copyright Act. Under that section, certain works receive the protection of U.S. copyright law if—and only if—they were first published in the United States, a treaty party, or another qualifying location.⁴³ The Copyright Office need not and should not issue guidance on this point, either. The decision of whether to bring a work within the scope of U.S. copyright protections (or the protections of another nation) is best left to creators, and is not well suited to prescriptive rules that treat all online works the same way. *Moberg* demonstrates that such prescriptivism could frustrate creators' expectations by, in effect, subjecting them to a multitude of transnational legal formalities that the Berne Convention was intended to minimize.⁴⁴ In other

⁴⁰ 17 U.S.C. § 411(a); *Fourth Estate*, 139 S. Ct. at 891; *Kernel*, 694 F.3d at 1301.

⁴¹ *See Moberg v. 33T, LLC*, 666 F. Supp. 2d 415, 419-20 (D. Del. 2009); *see also Kernel*, 694 F.3d at 1303; NOI, 84 Fed. Reg. at 66331 (citing *id.*).

⁴² 17 U.S.C. § 101.

⁴³ 17 U.S.C. § 104(b).

⁴⁴ *Moberg*, 666 F. Supp. 2d at 422-23.

words, it is not harmless to extend U.S. copyright protection to creators who do not want it. At the same time, there is no reason to deny U.S. copyright protection to creators who *do* want it, and for whom the Internet provides a plausible claim that their works were “first published in the United States” or a treaty party.⁴⁵

Accordingly, the Copyright Office would best serve creators’ reasonable expectations—and the need for flexibility across international copyright regimes—by adopting no rules or guidance on the nation of first publication for online works, and instead leaving that question for each individual applicant to resolve based on its preferred choice of law.

C. Response to Question No. 2: The Registration Guidance with Respect to Authorizing, Restricting, and Advertising Distribution of Online Works

The NOI’s Question No. 2 asks whether the Copyright Office should propose a regulatory amendment or offer further guidance on the following questions: (1) how to demonstrate authorization for others to distribute or reproduce an online work; (2) whether conditional or restricted distribution constitutes “Publication”; and (3) whether advertising works online or on social media constitutes “Publication.”⁴⁶

Authors Alliance believes that bright-line guidance is desirable on these issues as well, and that clarity is best served by treating an online work that lacks technological constraints on downloads or redistribution as a “Publication.” Thus, an online work should be presumed to embody the copyright owner’s authorization to distribute or reproduce it *unless* the owner imposes technological barriers to those acts. The converse of this “clear statement” rule is that when a work is posted conditionally or in restricted form, it should not be treated as a “Publication.” This approach would foster clarity, and would conform to the statutory, industry, and common sense understandings of what is, and is not, a “Publication.”⁴⁷

Clear guidance is also appropriate for instances of online or social media advertisements, although the publication status of advertisements is largely answered by the statutory text. The advertisement of a work is generally not treated as identical to the work itself. For example, a “work of visual art does not include . . . any merchandising item or advertising, promotional, [or] descriptive” material.⁴⁸ Nor is an advertisement an “offering to distribute copies” of the work “*for further*” acts of distribution, public performance, or display—as opposed to an *initial* distribution, performance, or display.⁴⁹ Intuitive and practical considerations support this view as well. There is a common sense difference between the ways in which a work is advertised to the public and the ways in which a work is shared with the public; these are distinct steps in the public life of the work, distinct moments in time, and distinct processes. Moreover, the relative informality of social media, together with the comparative lack of control that a copyright owner may have over

⁴⁵ 17 U.S.C. § 104(b)(2).

⁴⁶ See NOI, 84 Fed. Reg. at 66333. Question No. 2 also asks whether a regulatory amendment or guidance should address “[t]he timing of publication when copies are distributed and/or displayed electronically.” *Id.* That question is addressed in Section II.B.1. above.

⁴⁷ See generally Section II.B.1. above.

⁴⁸ 17 U.S.C. § 101.

⁴⁹ *Id.*

proprietary social media platforms owned and operated by independent technology companies, counsels against a rule that would require copyright owners—in order to avoid publishing their works—to impose technological restraints on redistribution of social media advertisements. For these reasons, mere advertisements of a work on social media, which do not in themselves reproduce complete copies of the copyrightable work, should not be treated as “Publications” within the meaning of the statute.

D. Response to Question Nos. 7 and 8: The Rules and Guidance Proposed by Authors Alliance Can Be Promulgated Within the Confines of Current Law

The NOI’s Question Nos. 7 and 8 ask whether Congressional action is desirable or necessary to address the issues arising from online publication.⁵⁰

Many scholars believe it would be salutary for Congress to revise the copyright laws—not only with respect to the defined term “Publication” and the ways in which it triggers other parts of the 1976 Copyright Act, but more comprehensively as well.⁵¹ Authors Alliance agrees with these authorities that legislative reform would likely benefit U.S. copyright law significantly and across many dimensions.

But legislative reform is not *necessary* for the Copyright Office to promulgate the rules and guidance that Authors Alliance has outlined above. By statute, the Register of Copyrights has the authority to establish all “regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this title.”⁵² And in considering its authority to promulgate rules and guidance, the Register of Copyrights does not face a blank slate. In 2008, the Copyright Office solicited and evaluated numerous public comments “regarding the Office’s authority to issue a rule that would have a wide-reaching impact on activities outside the scope of Section 115.”⁵³ After reviewing the case law, the Copyright Office concluded that it has “authority to interpret statutory terms that are central to its role[.]”⁵⁴

The definition of “Publication”—and in particular, how that definition should be read in connection with applications for copyright registration—is indisputably central to the role of the Copyright Office. Indeed, “registration and recordation of copyrights” is the “primary and almost exclusive administrative function” lying at the historic core of the Copyright Office and its

⁵⁰ Specifically, Question No. 8 asks whether there is “a need for Congress” to clarify “the definition of publication in the digital environment.” Question No. 7 asks whether there is “a need to amend section 409 so that applicants for copyright registration are no longer required to identify whether a work has been published and/or the date and nation of first publication,” or whether legislation is required “to provide the Register of Copyrights with regulatory authority” to alter section 409(8)’s requirements for certain classes of works. See NOI, 84 Fed. Reg. at 66334.

⁵¹ See, e.g., Cotter, *supra* note 7, 92 MINN. L. REV. at 1788 (“[P]ublication has been pressed into service for too many disparate purposes. A more rational copyright policy might focus on the consequences that now follow from the fact, date, or place of publication”); see also Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 551.

⁵² 17 U.S.C. § 702.

⁵³ 73 Fed. Reg. 66173, at 66174 (Nov. 7, 2008).

⁵⁴ *Id.* at 66175.

antecedents.⁵⁵ It is therefore squarely within the Copyright Office’s authority to issue rules and guidance on how copyright owners should interpret statutory terms for purposes of their registration applications.

E. Response to Question Nos. 4 and 5 Regarding a Single Application to Register Both Published and Unpublished Works

The NOI’s Question Nos. 4 and 5 ask whether the Copyright Office should alter its practices or amend its regulations to facilitate the registration of published and unpublished works in the same application (which is not feasible on the current generation’s registration platform). Authors Alliance views these questions as addressing logistical and practical matters, rather than substantive copyright protections.

However, whatever registration system is used, it should support the goals of transparency and public notice for which the copyright register was originally created. Thus, the registration system should provide clear and easily accessible information regarding the ways in which copyright owners released their works. At a minimum, this information should include which works were published, when each one was first published, in what nation (or nations) each one was first published, and on what website (if applicable) each one was first published.

III. CONCLUSION

We thank the Copyright Office for its attention to this submission, and look forward to further participation and dialogue on these important issues.

⁵⁵ Joseph P. Liu, *Copyright Rulemaking: Past as Prologue*, 33 BERKELEY TECH. L.J. 627, 629 (2018) (noting that a “focus on registration is reflected in the very first sets of copyright regulations promulgated by the Copyright Office”).