Before the
United States Copyright Office
Library of Congress

In the Matter of: Online Publication	Docket No. 2019-7

COMMENTS OF THE ENTERTAINMENT SOFTWARE ASSOCIATION[1]

The Entertainment Software Association ("ESA") is pleased to provide these Comments in response to the Copyright Office's Notification of Inquiry ("NOI") concerning online publication.[2]

The ESA provides these Comments to highlight the unique copyright registration issues presented by video games, particularly as they relate to publication. Video games may be the most complicated type of copyrighted work, in part because they generally involve both audiovisual and computer program authorship, often have multiple versions, are updated frequently, and involve both online and downloaded components. As a result, copyright registration of games presents unique issues, such as how to protect a game that has both published and unpublished elements. In this respect, games are different from photographs and other visual art works, as to which concerns about publication primarily seem to have arisen from difficulties individual creators have had understanding and tracking whether dissemination of particular works in different forms of online media constitutes publication, as opposed to the nature of the works themselves.[3]

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[1] These Comments are submitted on behalf of the ESA by Benjamin E. Golant, its Chief Counsel for Intellectual Property Policy.

[2] 84 Fed. Reg. 66,328 (Dec. 4, 2019); *see also* 85 Fed. Reg. 3303 (Jan. 21, 2020).

[3] *See* NOI, 84 Fed. Reg. at 66,328 & n.2.

Video game companies generally understand the concept of publication as it exists under current law, find it satisfactory, and do not believe that any statutory change is required. The ESA and its members particularly would not support legislation that materially changed the traditional contours of publication or caused works that traditionally have been considered unpublished to be treated as published, unless the copyright owner elected such treatment. However, we believe the Office should adopt a more flexible approach to registration of video games that reflects their unique characteristics, including with respect to publication.

I. Background

The ESA represents nearly all of the major game platform providers and almost all of the major video game publishers in the United States. Its members constitute one of America's fastest-growing industries, and the ESA's members make an enormous contribution to America's economy. Over 164 million adults in the United States play video games,[4] with three-quarters of Americans having at least one gamer in their household.[5] In 2019, total U.S. video game software revenue was over $35 billion.[6] That success is attributable in significant part to copyright protection. It is common for developers to spend tens of millions of dollars on the development of a game. Like major motion pictures, production budgets for major games can exceed $100 million. That level of investment in the creation of new works is not possible without effective intellectual property protection.

Video games are uniquely complicated copyrighted works. As the Office knows well, "a videogame contains two major components: the audiovisual material and the computer program

[4] *2019 Essential Facts About the Computer and Video Game Industry*, ESA (2019), https://www.theesa.com/esa-research/2019-essential-facts-about-the-computer-and-video-game-industry/

[5] *Id.*

[6] *Id.*

that runs the game."[7] These components are typically developed in tandem, have the same copyright owner, and constitute a single copyrighted work. However, they are not necessarily distributed together. For example, in the case of a game title distributed to the public by means of download or physical media, there often is separate software stored on a server to enable online gameplay as well as separate downloadable content, in-game items, and social features.

As the Office also knows, "[v]ideogames are commonly released on several different platforms."[8] In such cases, the Office generally seems to require the copyright owner to identify one version as the original and the others as derivative works thereof (with the differences being separately registrable if they are sufficiently original). That construct often is unrelated to the creative and commercial reality of game development and distribution.

In addition, video game content often changes over time. Pre-release, non-final versions of video games are often made available to controlled and limited sets of users for limited times for testing purposes (sometimes referred to as alphas, betas, demos or playtests). Typical practices in this regard probably do not constitute publication. However, once a game is released (which often means published), there are often frequent updates and additions of new downloadable content to keep the game experience fresh for players. These circumstances combine to make registration of video games more complicated than in the case of works such as novels and photographs.

[7] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 807.7(A)(1) (3d ed. 2017) [hereinafter Compendium].

[8] Compendium, § 807.7(A)(2).

II. The Office's Subjects of Inquiry

With that as background, these Comments turn to the specific questions raised by the NOI.[9]

1. Regulatory Guidance Concerning Date and Nation of First Publication

The NOI asks about potential regulatory guidance the Office could provide to assist applicants in determining whether their works have been published, and if so, the date and nation of first publication, for purposes of completing registration applications. The ESA is skeptical about using regulations as a vehicle for providing this kind of guidance. For sophisticated companies with access to experienced copyright counsel, more guidance does not seem necessary. For registrants without access to experienced copyright counsel, regulations seem unlikely to be sufficiently accessible to be useful.

The concept of publication has very deep roots in U.S. copyright law. As a result, the basic principles of publication are well-established, not only by the statutory definition, but also by legislative history and a substantial body of case law. The Office already provides significant guidance concerning those principles.[10] Game companies generally understand these principles and do not report having had significant difficulties applying these principles to their products. Instead, the publication issues that game companies have encountered while registering their copyrights have tended to involve unique characteristics of particular game titles. Such issues probably are not susceptible to treatment in guidance of general application. Game publishers also generally control the territorial release of their products and have a well-defined release schedule, making the country or countries and date of first publication clear enough. As a result,

[9] The numbering of the list of subjects in the NOI omits item #6. These Comments follow the Office's numbering.
[10] *E.g.*, Compendium § 1008.3(F), ch. 1900.

further regulatory guidance concerning publication, including the date and nation of first publication, does not seem particularly helpful for video game publishers (or probably other sophisticated corporate registrants).

To the extent that other registrants may benefit from further general guidance, such guidance would be more accessible to them in circulars, other explanatory materials on the Office's website, and in-application assistance tools within the Office's electronic registration system (eCO) than it would be in regulations. As noted above, the Office already provides a fair bit of guidance concerning publication in the Compendium. At almost 1200 pages in length, the Compendium is a daunting document even for experienced registrants. But at least it is written in plain English, has numerous examples, is thoroughly cross-referenced, and is designed to be accessible to non-lawyers.

If the guidance in the Compendium is judged insufficient, it would seem best to provide further guidance by a means that is even better suited to an audience of non-lawyers. As the Office has recently stated, "users approach the system with varying levels of understanding of copyright law."[11] As a result, it makes sense for the Office to provide guidance concerning copyright registration issues through the full range of mechanisms the Office has said it will pursue going forward, including FAQs, questionnaires, video tutorials, and in-application assistance.[12] Those seem like promising means of providing guidance concerning publication as well. Providing further guidance in regulations that are primarily known to and used by lawyers would be a step in the wrong direction.

[11] Statement of Policy and Notification of Inquiry, 85 Fed. Reg. 12,704, 12,706 (Mar. 3, 2020).

[12] *See id.*

2. Specific Potential Clarifications

The NOI also asks about various specific potential clarifications. As described above, we do not believe that video game companies need further guidance concerning the law of publication, including the specific possibilities raised by the Office. To the extent issues have arisen for game publishers, they seem to pertain more to the difficulty of accommodating complex works within a registration system rigidly divided by publication status and date than to uncertainty determining publication status or date. However, in case there is interest by others in these specific possible subjects of clarification, we comment concerning their application to the video game industry.

First, the utility of regulations addressing circumstances in which a copyright owner might publish a work by authorizing others to distribute or reproduce it when it is posted online. This is not a method by which a video game publisher is likely to publish a video game. Even if a video game publisher authorizes the user of an online game to disseminate screen shots, short video clips, or other artifacts of the user's personal gameplay, that would not constitute publication of an otherwise unpublished game as a whole.

Second, clarification of the timing of electronic publication. As noted above, video game publishers generally have a well-defined release schedule for their products, so it is not difficult for them to know when, for example, they made a work available for download by the public.

Third, circumstances in which one party provides a non-final version of a work to another party, such as a client, subject to limitations on further redistribution. We are not aware of significant issues concerning this kind of controlled and limited dissemination that have arisen in the video game industry. However, to be clear, the kind of private activity described, such as where a contractor delivers artwork to a game developer, a developer delivers game elements to

a publisher, or a publisher conducts pre-release testing of the non-final version of a game with a controlled and limited group of testers, is not distribution to the public, and so does not constitute publication.

Finally, whether advertising works online or on social media constitutes publication. Merely advertising a work, as opposed to "distribution of copies or phonorecords of [the] work to the public,"[13] does not constitute publication whether that advertising occurs online, on social media, or in traditional media. Thus, for example, a console game is published on its release date, not by pre-release publicity concerning the future availability of the game.

3. Deemed Publication Online

The Office asks whether it should adopt a regulation that would allow an applicant for copyright registration to satisfy applicable requirements "by indicating that a work has been published 'online' and/or identifying the nation from which the work was posted online as the nation of first publication."[14] We interpret this as a suggestion to accommodate some sort of "deemed" publication, whereby a work that might be unpublished could be declared to be published by virtue of the registration application and therefore be registered as a published work.

Such an option likely would be of little interest to video game companies because they probably would not generally wish to have their works that historically have been considered unpublished treated as published. Instead, to address the registration issues that video game companies encounter, it would be preferable to adopt other forms of flexibility in the registration system, such as allowing published and unpublished aspects of a video game to be registered on

[13] 17 U.S.C. § 101.

[14] NOI, 84 Fed. Reg. at 66,334.

a single application, or allowing aspects of a game with different publication dates to be registered on a single application. However, if the registration system otherwise remained unchanged, it is possible that in some circumstances it would be convenient for video game companies to have certain unpublished elements of a game deemed published by virtue of a registration application, so as to be able to cover more aspects of the game with a single application.

If the Office were to provide such an option, the nation (or nations) of publication should be the nation(s) to which distribution of copies to the public was targeted, not the nation from which the distribution originates (*e.g.*, the source of an upload or the location of servers). Often, the nation of targeted distribution and the nation from which distribution originates may be the same, since it seems reasonable to believe that many people making material available online would think of targeting their fellow countrymen first, and perhaps do that by writing in the language of their country, charging a fee denominated in the currency of their country, applying terms of use governed by the laws of their country, and so forth. However, that is not necessarily so. When a publisher in one country aims its distribution efforts at another country, treating the country of origin as the country of publication would upend traditional notions of publication and territoriality and lead to counterintuitive results.[15]

For example, consider a hypothetical U.S. release of a video game targeted for the U.S. market through the use of the U.S. English language, U.S. dollar pricing, and U.S. law license terms, and available only to consumers in the U.S. as determined by geolocation technology and

[15] *See, e.g., Litecubes, LLC v. Northern Light Products, Inc.*, 523 F.3d 1353, 1371-72 (Fed. Cir. 2008) (shipping infringing items into U.S. is distribution in the U.S); *Subafilms, Ltd. v. MGM-Pathe Communications*, 24 F.3d 1088 (9th Cir. 1994) (authorization within the U.S. of distribution outside the U.S. not subject to U.S. copyright law); *cf. Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904 (D.C. Cir. 2018) (streaming from Poland to U.S. is performance in the U.S.).

payment card information. The nation of publication of that game should not depend on the location of the game publisher's servers or its employees operating those servers. If the release was by a publisher in Japan with downloads to the U.S. originating from its servers in Japan, it would not make sense to consider Japan the nation of first publication. Traditional notions of publication point to the U.S. as the nation of publication in those circumstances, and the Office should not adopt a regulation to the contrary.[16]

4. Partitioning of Registrations with Erroneous Publication Status Information

The NOI notes that "[a]pplicants cannot currently register published works and unpublished works in the same application" and asks about a possible approach to addressing erroneous mixing of published and unpublished works in a single application.[17] As we understand this proposal, it is intended to provide a mechanism for owners of registered copyrights who later discover defects in the classification of registered works as published or unpublished to correct such defects by partitioning the existing registration into published and unpublished sections.

The ESA supports adoption of such a procedure because we do not believe that efforts of copyright owners to enforce their copyrights against infringers should be stymied by innocent, technical mistakes in registration applications when a work is clearly protected by copyright. It should be possible for copyright owners to correct such errors without losing the benefits of an earlier timely registration. However, we view such a procedure as only a partial solution to an

[16] The decision in *Moberg v. 33T LLC*, 666 F. Supp. 2d 415 (D. Del. 2009), does not compel a contrary conclusion. That case involved photographs posted on a "German website," specifically, the website of an art gallery in Germany. *Id*. at 418-19, 422-23. While the court mentioned the location of the site operator in Germany, it is not apparent from the decision that the gallery targeted customers anywhere other than Germany. If the German gallery's site had been written in French and made available only to users geolocated to France, it would seem strange to consider the posting a publication in Germany.

[17] NOI, 84 Fed. Reg. at 66,334.

unnecessarily rigid registration system. Going forward, the Office should also adopt procedures such as those discussed in item #5 below.

5. Group Registrations Combining Published and Unpublished Works

The Office inquires whether it should allow copyright claimants filing group registration applications to register published and unpublished works together in a single group (once systems issues are addressed). The ESA supports such a change and urges the Office to consider adoption of a group registration option for video games that would allow a more flexible approach to registering related game software and content having different publication statuses and dates, as well as versions of games for multiple platforms.

As we understand it, the current inability to mix published and unpublished works in a single registration is due to a Copyright Office computer system limitation rather than a substantive legal issue.[18] That is, there is no inherent legal reason why the requirements of Section 409, and the policy of creating a public record of facts concerning publication, could not be satisfied by a group registration covering both published and unpublished works (if the published works were identified and the necessary information provided). The Office should seek to address the systems issue and provide the registration flexibility the law permits.

More generally, and as described above, video games present unique registration issues due to characteristics such as multiple versions, combinations of online and downloaded components, and frequent updates. Under the current requirement to register games as individual works, including the requirements that the work be identified as published or unpublished and that a single publication date be provided for a published work, it often would be necessary to file multiple registration applications to cover all the copyrighted material associated with a

[18] NOI, 84 Fed. Reg. at 66,330.

particular game title. Dribbling such applications into the Office would be inefficient for video game publishers and for the Office, and as a practical matter, the copyrights in some material, such as a particular day's new downloadable content, tend never to be registered. This is exactly the kind of situation that other group registration options were designed to address.

The Office should provide more flexible registration options that allow registration of games with fewer complications due to circumstances such as the publication status and publication date of specific game elements. For example, when a game is available in multiple versions for different platforms, it would be desirable to be able to cover in a group registration process the various related versions of a game originating from a single, integrated game creation process. If the initial registration for a published game title is made for a version of a game other than the one existing at the game's release date, it should be possible to register the game as such on a single application, including updates between the release date and application date. Likewise, it should be possible to register on a single application subsequent updates published over a period, such as a quarter.

7. Need for Amendment to Section 409

The NOI asks whether it is necessary to amend Section 409 to eliminate the requirement that registrants identify the publication status, date, and nation of their works. Implementing a registration system that did not collect publication information for published works would seem to require a statutory change. However, the ESA does not believe that it is necessary to make such a fundamental change in the registration system.

So far as video games are concerned, the issue is that the registration system currently limits the scope of a single registration by publication status and date, while as a creative and commercial matter, a video game is an integrated work with various elements that may have

different publication statuses and dates. The current statute provides the Office enough flexibility to register the copyrights in games with less balkanization by publication status and date. It should seek to use that statutory flexibility to provide registration procedures for games that will be less unwieldy for game companies and the Office alike.

8. Need for Other Statutory Amendments

The Office inquires whether it is necessary for Congress to amend the Copyright Act in other ways to address publication in the digital environment, either by elaborating on the current statutory definition of publication or by having some event other than publication trigger the consequences that currently follow from publication.

The ESA does not believe there is a need for Congress to address publication in the digital environment. As noted above, the basic legal principles seem clear enough, and there is already a lot of legal authority that can be drawn upon to determine whether a particular work is or is not published. The issues that seem to have driven the recent interest by policymakers concerning the concept of publication involve a lack of flexibility in the registration system and the resulting possibility of draconian consequences when errors are made in identifying the publication status of a work.[19] A lack of understanding of the concept of publication by some users of the registration system may also be a factor.

The Office can and should take steps to address those matters without legislation. In particular, allowing published and unpublished works to be combined in a single group registration, as discussed in item #5 above, would seem to address the harsh consequences of making an error in the current system where published and unpublished works cannot be

[19] *E.g.*, *Gold Value Int'l Textile v. Sanctuary Clothing*, 925 F.3d 1140 (9th Cir. 2019) (affirming dismissal of infringement action and award of attorney's fees and costs to the defendant where published textile designs were included in registration as an unpublished collection).

combined in a single registration. In addition, providing guidance in circulars, other explanatory materials on the Office's website, and in-application assistance tools within eCO, as discussed in item #1 above, would be easier to achieve than a statutory amendment and likely have a larger positive effect on non-lawyer users of the registration system.

The ESA and its members would oppose amending the Copyright Act to make the consequences that currently flow from a work's publication triggered by some different event, so as to make works that traditionally have been considered unpublished to be treated as published. Such a change seems unnecessary and we are concerned that it could produce new complications and unintended consequences.

9. Additional Considerations

The Office also invites comment on other considerations relating to online publication. In that regard, the ESA urges the Office to consider specifically the unique registration issues, including issues related to publication, that are presented by video games. Recent policy discussions of publication issues have largely centered on the online display of photographs and other visual art works, and particularly on confusion about the implications of such activities for identifying publication status in the registration context. We are sympathetic to those concerns and believe they could be satisfactorily addressed by some combination of more flexible registration practices and educational materials that are more accessible to non-lawyers than the case law concerning publication or even the Compendium.

Video games present distinct issues, such as the need to protect diverse aspects of games that are not necessarily all distributed together, including updates and additions of new downloadable content that have different (and often frequent) dates of first publication. Those

issues deserve a place in the Office's consideration of publication along with issues relating to photographs and visual art works.

III. Conclusion

The ESA appreciates the opportunity to provide these Comments and hopes the Office will consider and adopt registration processes for video games that reflect the unique characteristics of these creative works and allow more flexible registration of game elements with different publication statuses and dates.

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Respectfully submitted,

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