

# US copyright enters the social media age

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*New US Copyright Office rules will make it easier for social media creators and bloggers to protect their work. But is the US still behind the times? Kelsey Farish of DAC Beachcroft reports.*

From August, the US Copyright Office (USCO) will allow group registrations of short online literary works, which will mean enhanced copyright protections are available for short social media posts, blog entries, and other online articles.

Under the scheme, known as GRTX, applicants may register up to 50 online literary works—which can be as short as 50 words—with a single application and fee. To explore why USCO is taking this particularly interesting policy step, this article briefly considers the formalities of the copyright regime in the US, together with the ongoing debate concerning how best to modernise legislation appropriately for the digital age.

## The registration regime

Copyright formalities are the various prerequisites that a creator may be required to fulfil in order to enjoy copyright protection in a particular jurisdiction. These may include sending a copy of the work to be deposited with a national registrar, or featuring a copyright notice on publications.

If this sounds like a foreign concept, especially to readers in the UK and Europe, it is perhaps useful to step back to the pre-Berne Convention era. The Berne Convention for the Protection of Literary and Artistic Works introduced the concept that copyright exists the moment a work is fixed in a tangible medium, doing away with formal registration requirements.

The earliest signatories of the Berne Convention included France, Germany, the UK, Italy, Spain and Switzerland, who ratified the agreement in 1887. The US acceded to Berne only relatively recently, in 1989: prior to this, copyright formalities were still very much the norm. During that time, for example, failure to include an explicit copyright notice which clearly identified the author and the date of publication on a work would release it into the public domain.

As a Berne Convention signatory, the US must now effectively provide automatic copyright protection, but it is important to note that certain formalities must still be met for a copyright owner to benefit from ‘enhanced’ copyright protection.

One such lingering formality is registration.

While distinct from the granting of copyright protection—which, as explained above, is now essentially automatic—registration of copyright remains a necessary condition before an infringement suit can be initiated in the US. The availability of certain remedies, for example recovery of statutory damages and attorneys’ fees, likewise depend on timely registration.

Registration normally entails submitting an application form, a fee of \$55 (£43), and a deposit of two copies of the work, for inclusion in the Library of Congress.

## Background to GRTX

In most cases, a separate application must be filed for each individual work to be registered. Over the last several decades, however, there has been a gradual streamlining of the process to allow the registration of multiple works on one application, in certain limited circumstances.

In its commentary on the Copyright Act 1976, Congress noted that requiring separate applications where “related works or parts of a work are published separately” may impose “unnecessary burdens and expenses on authors and other copyright owners”.

As such, a single application may be used when multiple works, serials or photographs meet the prescriptive requirements for “group registration” set out in the Compendium of USCO Practices at Chapter 1100. In December 2016, the USCO updated the governing legislation to allow group registrations for works published in periodicals, referred to as GRCP.

Eligibility was narrowly constrained to those pieces featured in “a collective work published on an established schedule in successive issues” such as a newspaper, magazine, or newsletter. Websites, on the other hand, are continually updated: as

each successive update is not distributed or designated as a discrete, self-contained issue, they are not considered periodicals for purposes of GRCP registration.

Quick to point out this discrepancy were the National Writers Union, the Authors Guild, the American

Society of Journalists and Authors, the Science Fiction and Fantasy Writers of America, the Songwriters Guild of America, and several other literary and writers' associations. Together, these organisations submitted a joint petition for a new rule which would specifically address group registration for works first published online.

The petition explained that writers routinely create granular content on blogs, social media platforms, and other internet publications, or otherwise create and distribute short-form works such as poems, short stories, essays, articles, pamphlets, and research papers online.

Because the GRCP is unavailable for online works, in order to enjoy the benefits of copyright registration, a writer would need to complete a separate application every time they posted a new work, or the website was updated.

As this would, for the majority of content creators and authors, be “prohibitively costly and timeconsuming”, the petitioners asked the USCO to designate a new group registration specifically for short works disseminated online. The Copyright Office agreed, and in late 2018 published its recommendations for a new group registration option for short online literary works.

## Procedure

On June 22, 2020, the Federal Register—the daily journal of the US federal government—published its amendment to Title 37- Patents, Trademarks, and Copyrights of the Code of Federal Regulations (CFR), Part 202: Preregistration and Registration of Claims to Copyright.

Due to the number of works potentially eligible for GRTX, along with the complexity of reviewing copyrightability of short-form works, the USCO has emphasised that it will strictly apply the eight eligibility requirements, which are described below.

The first four requirements cover whether a work is registrable under the new regime, and sets out the specific rules as to content and provenance.

First, the GRTX group in question may include up to 50 separate literary works, each containing at least 50 but no more than 17,500 words (which is approximately 35 pages, single-spaced).

The works may be poems, short stories, articles, essays, columns, blog entries, or social media posts published as part of a website or online platform, including social media platforms. However, the works may not include computer programs, audiobooks, podcasts, or emails. Artwork, photographs, or indeed any form of authorship other than “text” will be rejected, as those works are covered under a separate set of rules.

Second, all the GRTX works in a group must be published within a three-calendar-month period.

Third, all works must be written by the same individual, or jointly by the same individuals, and attributed accordingly.

Fourth, the works must not be works made for hire. This will normally be at issue where a work is created by an employee as part of his or her job, as US copyright law generally treats the employer— and not the individual employee—as the author.

This carve-out has explicitly been included as GRTX is designed to benefit individual writers who do not have the time or resources, or both, to register their works. This will be less of a concern for corporate authors or professional writers.

The final four requirements speak to the administrative technicalities for uploading the works to the online registration system. The fifth and sixth requirements, respectively, are that the applicant must provide a title for each work and a title for the group as a whole, and submit the requisite online application designated for GRTX.

As an encouraging aside, in its commentary to the new rule, the Federal Register notes that the USCO “is beginning to work on the technical requirements for its next-generation registration system, and it does not intend to conduct any further development on the current system”.

Until then, claims submitted for GRTX will need to be adapted to fit within the registration system as it currently exists. To meet the seventh requirement the applicant must submit one complete copy of each work, for deposit with the Library of Congress.

The works “must be assembled in an orderly form with each work in a separate digital file”, with the file name for each work exactly matching the title as submitted on the application.

The works must be submitted in one of the USCO's approved formats, and uploaded in a .zip file which does not exceed 500MB. Finally, the applicant must submit a sequentially numbered list containing a file name for each work in the group, to include the publication date and word count for each work.

## Implications

The US is unusual among Berne Convention signatories in that it still operates a widely used public copyright registry. Although registration is no longer a strict precondition for copyright to arise, Congress encourages the process by providing several legal advantages to those who register.

In practice, it is a stated policy objective of the USCO that the new GRTX rule will encourage broader participation in the registration system.

Group registrations are welcomed as a convenient and cost-effective way for a creator to obtain copyright protection for multiple works in one shot, but despite being within the USCO's gift for the last 45 years, the group registration scheme has been rather slow to address the rapid advances of digitisation over the last decade in particular.

Today, anyone with a mobile phone can put their literary and creative works online: as content becomes easier to make and share, so too have unauthorised modification and misappropriation become more pervasive.

As many IP professionals will have observed, even with prima facie evidence to support an infringement claim, enforcement and litigation can be arduous. While this new GRTX rule may benefit an ultimately litigious author, one may question to what extent such copyright infringement claims are pursued in any event.

There is a fine line separating unwanted infringement and much sought-after publicity. The digital natives of the Millennial and Zoomer generations are accustomed to the perpetual trade-off between control over their IP on the one hand, and enjoying the benefits that widespread dissemination can bring, on the other.

As these young people make their way up through the ranks of legislative and industry bodies, one may query to what extent we will see a rebalancing of copyright norms and legal priorities in the years to come.

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