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Directorate-General for Internal Market and Services, Unit D1 - Copyright
European Commission
SPA 2 04/085
1049 Brussels
BELGIUM

By email: markt-copyright-consultation@ec.europa.eu

Re: “Public Consultation on the review of the E.U. copyright rules”

This letter is submitted on behalf of the National Writers Union (E.U. Transparency Register ID No. 597605813080-10) in response to your consultation on E.U. copyright rules.

The National Writers Union (NWU) is a national labor union that advocates for freelance, contract, and self-employed writers. The NWU includes local chapters throughout the U.S. as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO.

As writers whose work is impacted by E.U. legislation and regulations, the NWU welcomes the opportunity to contribute to this consultation.

You have asked respondents to your questionnaire to identify themselves by type, with “author” and “publisher” as exclusive alternatives. We welcome your effort to distinguish organizations of writers (and other creators) from organizations of publishers.

All of our members are writers. Many, perhaps most, of our members are also publishers. Self-publishing, especially digital self-publishing, is an increasingly common way for writers to exploit our work. We urge you, whenever you are considering publishing and publishers, to consider how your actions will affect writers who are also self-publishers.

We are disappointed that many of your questions group together writers and publishers – whose interests are often antithetical – under the umbrella of “rightsholders”. “Rightsholders” is rarely a useful category. We encourage you, in each such case, to inquire separately as to how your actions will affect writers, self-publishers, and third-party publishers. Third-party publishers and intermediaries do not represent writers, do not share our interests, and should not be allowed to serve as spokespeople for all “rightsholders”.

Writing and publishing practices vary from country to country. For this reason, it is important for you to consult with foreign writers and to consider how your actions may affect us. This is especially true with respect to both digital publishing and self-publishing. On the basis of our discussions with writers and organizations of writers in other countries, we believe that these publishing and business models are significantly more common in the U.S. than in the E.U.

Another difference between the U.S. and many other countries is that the overwhelming majority of U.S. writers do not belong to any labor union (such as the NWU) or other organization of writers, and do not participate in any collective licensing scheme. Most working writers in the U.S. are, by choice or by necessity, self-employed freelance entrepreneurs.

We support the "three-step test" for permissible exceptions to copyright, which is incorporated in the Berne Convention and in the definition of "fair use" in the U.S. Copyright Act. The problem for writers is not with the three-step test. The problem is that governments often fail to carry out the third step of the test, or to conduct the inquiry necessary to do so.

The Berne Convention permits certain exceptions to copyright, "provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

An understanding of the diverse forms of "normal exploitation" of writers' work is thus an essential prerequisite to the three-step test. Unfortunately, governments often assume that all commercial exploitation is carried out by third-party publishers, and ignore how writers exploit our own work. To the extent that they consider self-publication or new disintermediated business models at all, they often make mistaken assumptions about how we exploit our work, or rely on third parties who don't know or understand the ways writers earn our living in the digital age.

The Berne Convention protects the rights of foreign writers and creators. The application of the three-step test requires an understanding of "normal exploitation" of our work. In order to apply the three-step test, you must first consult foreign writers about how we normally exploit our work. Such a consultation must occur before you will be able to apply the three-step test.

We urge you, before proceeding further, to open a period of open consultation with foreign writers and creators concerning our business models and normal forms of exploitation of our work.

The E.U. directive on "orphan works" (Directive 2012/28/EU) exemplifies the dangers of enacting exceptions to copyright in written works without consulting working foreign writers about how we normally exploit our rights to those works.

Because foreign writers weren't consulted and the interests of writers whose work is likely to be deemed "orphaned" weren't considered, it was impossible to properly apply the three-step test to the proposed directive. The directive would permit activities which would conflict with our normal exploitation of our work. As we have explained in our recent comments to the U.K. government¹, it will be impossible for E.U. member states to implement the directive on orphan works without violating their obligations as parties to the Berne Convention.

We appeal to you to reconsider and repeal the E.U. directive on orphan works, and to start over by consulting with foreign writers and other foreign creators about our business and revenue models, to lay the necessary foundation for the application of the three-step test.

Your question regarding temporary copies of Web pages also requires an understanding of "normal exploitation" of Web content, in order to apply the three-step test.

The most common method of monetizing Web content is through online advertising, which depends on the number of clicks on the Web page. If each page view by an end user generates one hit on the original Web page, the making of a temporary copy as part of the process of transmitting that copy from the Web server to the end-user does not affect the clickstream revenue for the publisher of the Web site. But if multiple copies are distributed by an intermediary from a single "cached" copy, the publisher of the original site is deprived of the clickstream revenue she would have earned for each of those views of the "cached" Web page.

Licenses for distribution of Web content are often time-limited. If a search engine, archive, or other Web "spider" or "crawler" retains and distributes copies of a Web page after the license for the original Web site to publish that content has expired, the availability of those cached copies will undermine the ability of the writer to license that content to other sites.

The making of a single, temporary copy, as part of the transmission of Web content, does not generally interfere with normal exploitation of the work. But the making of multiple copies, or persistent copies, generally does. In order to comply with the three-step test and the Berne Convention, it is essential to explicitly limit both the number of such copies (one) and the amount of time for which such a copy can be retained (we suggest not more than 24 hours).

Registration of copyright as a prerequisite to certain remedies is a formality prohibited by the Berne Convention, and a flagrant breach by the U.S. of its obligations as a party to the Berne Convention. Most work created by U.S. writers or first published in the U.S. is not registered, effectively precluding redress for most victims of copyright infringement in the U.S. Having experienced first-hand the adverse effects of registration requirements in the U.S., we urge you to learn from the negative example of U.S. law, and not enact similar formalities in the E.U.

1 Comments of the NWU to the U.K. Intellectual Property Office Re: "Copyright works: seeking the lost; Consultation on implementing a domestic orphan works licensing scheme and the EU Directive on certain permitted uses of orphan works" (February 28, 2014), available at <<http://www.nwubook.org/NWU-UK-orphans-28FEB2014.pdf>>. See also NWU comments to the U.S. Copyright Office on "orphan works" (February 4, 2013), available at <<http://www.nwubook.org/NWU-orphan-works-4FEB2013.pdf>>, and NWU reply comments to the U.S. Copyright Office on "orphan works" (March 6, 2013), available at <<http://www.nwubook.org/NWU-orphan-reply-comments-6MAR2013.pdf>>.

It's also essential to consider how a scheme for recording of rights would operate, and how burdensome of time and fees it would be, as applied to the increasingly-common case of "granular" content published frequently but irregularly in numerous small, often untitled, elements, such as blog posts and comments or updates to Web pages.

In regard to enforcement of rights, U.S. authors have no effective means, in most instances, of enforcing our rights against infringements in the E.U. or any other countries. Existing mechanisms for enforcement of rights have been designed by large corporate publishers and other copyright licensees, not by writers or creators. They work well for large corporations, but badly for individual creators or self-publishers, and worst for individual foreign creators.

In practice, it is not usually a rational business decision for an author in the U.S. to take time away from writing, publishing, or marketing her work to try to pursue redress for infringement. This is true even for infringements in the U.S., but it is even more true for infringements and infringers in the E.U. or other countries. Pursuing such a claim is likely to require a large investment of time to figure out foreign legal procedures, perhaps in a foreign language, and/or a large investment of money for legal representation in a foreign country.

The amount of money lost to an instance of infringement can be large enough to be significant to a typical working writer, but still less than the cost of a single trip from the U.S. to the Europe to pursue a claim in person, or of retaining legal counsel in the E.U. As with small claims courts in the U.S., enforcement and redress procedures should be designed to be accessible to *pro se* claimants, without the need to hire professional representation. They should also be made accessible to claimants abroad, without the need to travel to Europe, through means such as adjudication on the basis of written submissions and/or audio or video conferencing.

The WIPO Copyright Treaty requires: "Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights." We have been encouraging the U.S. government to establish a "copyright small claims court" to fulfill U.S. obligations pursuant to this clause of the treaty. We encourage the E.U. and its member states to do likewise.

In designing enforcement and redress procedures, consideration should be given to how those procedures will work in the increasingly common situation in which an infringer of some rights to a work is also a publisher or licensee of other rights to the same work. For example, a common and extremely damaging form of infringement of writers' rights occurs when a writer assigns or licenses rights to publish a work in hardcopy form, but the publisher of the authorized print edition also distributes an unauthorized and infringing digital edition of the work.

We would welcome the opportunity to answer questions, consult with your staff, or participate in further consultations, particularly should you open a consultation on the meaning of "normal exploitation" of written work by working freelancers in the digital age.

We give our permission for you to publish this submission and our contact details.

Respectfully submitted,

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